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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 320.

THE MOBILE & MONTGOMERY RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

L. C. JUREY AND M. GILLIS, PARTNERS AS JUREY & GILLIS, FOR THE USE OF THE FACTORS' & TRADERS' INSURANCE COMPANY OF NEW ORLEANS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

FILED OCTOBER 3, 1881.

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1 May Term, 1881.

At a Circuit Court of the United States for the Fifth Judicial Circuit and Middle District of Alabama, begun and holden at Montgomery, Alabama, on the first Monday in May, it being the 2d day of said month, in the year of our Lord one thousand eight hundred and eighty-one.

Present and presiding: The Hon. John Bruce, Judge of the District Courts of the United States for the State of Alabama, sitting as circuit judge.

The following proceedings were had, to wit:

Transcript from City Court of Montgomery.

THE STATE OF ALABAMA, }
MONTGOMERY COUNTY. }

Be it remembered that at a term of the city court of Montgomery, begun and holden for said county, at the court-house in the city of Montgomery, in said county, on the third Monday in February, it being the 17th day of February, in the year of Lord one thousand eight hundred and seventy-nine.

Present: The Honorable John A. Minnis, judge presiding.

2 The following proceedings were had, and the following judgments were rendered, to wit:

STATE OF ALABAMA, }
MONTGOMERY COUNTY. }

To any sheriff of the State of Alabama, greeting:

You are hereby commanded to summon the Mobile and Montgomery Railway Company, a corporation chartered under the laws of the State of Alabama, to appear at the next term of the city court of Montgomery to be held for said county, at the place of holding the same, then and there to answer the complaint of L. C. Jurey and M. Gillis, partners under the name and style of Jurey and Gillis, who sue for the use of the Factors' and Traders' Insurance Company of New Orleans, a corporation chartered and doing business in the State of Louisiana.

Witness my hand this the seventh day of January, one thousand eight hundred ond seventy-nine.

E. H. METCALF, *Clerk.*

3 *Complaint.*

THE STATE OF ALABAMA, }
MONTGOMERY COUNTY. }

In the City Court of Monfgomery County. February Term, 1879.

L. C. JUREY AND M. GILLIS, PARTNERS under the name and style of Jurey and Gillis, who sue for the use of the Factors' and Traders' Insurance Company of New Orleans, a corporation chartered and doing business in the State of Louisiana, Plaintiffs,

vs.

THE MOBILE AND MONTGOMERY RAILWAY Company, a corporation chartered under the laws of the State of Alabama, Deft.

The plaintiffs claim of the defendant the sum of twelve thousand dollars as damages for the failure to deliver certain goods, viz., one hundred and ninety-seven bales of cotton, weighing ninety-six thousand nine hundred and thirty-six pounds, received by the defendant, as a common carrier, to be delivered to the plaintiffs at New Orleans, La., for a reward, which it failed to do.

D. S. TROY,
Pltfs' Atty.

4 The plaintiffs being non-residents, we acknowledge ourselves security for costs.

FARLEY, SPEAR & CO.

MONTGOMERY, ALA., *January 7th*, 1879.

Received in office, January 7th, 1879.

C. T. POLLARD, JR., *Sheriff.*

Executed by serving a copy of the within summons and complaint on E. L. Tyler, vice-president and superintendent of the Mobile and Montgomery Railway Company, January 7th, 1879.

By W. D. WESCOTT, *D. S.*
C. F. POLLARD, JR., *Sheriff.*

To the Honorable Jonh A. Minnis, Judge of the City Court of Montgomery.

Your petitioner, the Mobile and Montgomery Railway Company, a corporation chartered and existing under the laws of the State of Alabama, and a citizen of said state, respectively represents unto your honor that there is pending in the city court of Montgomery, in the county of Montgomery and state aforesaid, a suit, and only one suit, wherein L. C. Jurey and M. Gillis, partners under
5 the firm name and style of Jurey & Gillis, citizens of the State of Louisiana, who sue for the use of the Factors' and Traders' Insurance Company of New Orleans, a corporation chartered and doing business in the State of Louisiana, and a citizen of said State

of Louisiana, are plaintiffs, and your petitioner is defendant, in which said suit the matter in controversy exceeds, exclusive of costs, the sum of five hundred dollars, and which said suit was commenced on the 7th day of January, A. D. 1879.

Petitioner further states that at the time of the commencement of said suit, and now, the plaintiffs were residents and are residents of the State of Louisiana, and that petitioner and this defendant is a citizen of the State of Alabama. Petitioner also states that the said suit is of a civil nature, and the same is a suit at law between citizens of different states, and has never been tried, and that this is the first term of said court at which said suit could have been tried since its commencement. Petitioner further represents unto your honor, that petitioner herewith files in this court a bond, with good and sufficient sureties, conditioned that petitioner will enter a
6 copy of the record of said suit in the Circuit Court of the United States for the Middle District of Alabama (being the district in which entitled suit is pending) on the first day of the next session of the said United States Circuit Court for the Middle District of Alabama, as aforesaid, and will pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, as authorized under the statutes in such cases made and provided. Wherefore your petitioner, the defendant herein, prays the removal of said suit so pending in said city court of Montgomery, as aforesaid, from said state court to the next term of the Circuit Court of the United States for the Middle District of Alabama, as by law provided, at Montgomery, Alabama. And that your honor make such other further general or different order as to your honor may seem proper in the premises, in order that said cause may be removed from this court, as aforesaid, according to the law of the land and the prayer of your petitioner;
7 and as in duty bound your petitioner will ever pray, &c.

MOBILE & MONTGOMERY RAILWAY CO.,
By EDW'D L. TYLER, *V. P.*

Sworn to and subscribed March 4, 1879.

E. P. MORRISETT,
Notary Public, Montgomery Co., Ala.

Filed in open court March 4, 1879.

E. H. METCALF, *Clerk.*

THE STATE OF ALABAMA, }
COUNTY OF MONTGOMERY. }

Know all men by these presents, that we, the Mobile and Montgomery Railway Company, as principal, E. L. Tyler and Josiah Morris, as sureties, our heirs, successors, administrators, and assigns, are hereby held and firmly bound unto L. C. Jurey and M. Gillis,

partners using name of Jury & Gillis, in the sum of five hundred dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, heirs, administrators, and executors, firmly by these presents. The condition of the above obligation is such, that whereas on, to wit, the 7th day of January, 1879, L. C. Jury and M. Gillis, partners under the firm name and
8 style of Jury & Gillis, citizens of the State of Louisiana, who sue for the use of the Factors' and Traders' Insurance Company of New Orleans, a corporation chartered and doing business in the State of Louisiana, and a citizen of said State of Louisiana, brought a suit against the said Mobile and Montgomery Railway Company, a corporation chartered and existing under the laws of the State of Alabama, and a citizen of said State of Alabama, in the city court of Montgomery, in the county and state aforesaid, being the only cause pending in said court between the said parties; and whereas the said Mobile and Montgomery Railway Company, defendant therein, herewith files his petition in said cause for the removal of said cause into the Circuit Court of the United States for the Middle District of Alabama, pursuant to law: Now, if the said above bound the Mobile and Montgomery Railway Company shall enter in said Circuit Court of the United States for the Middle District of Alabama, on the first day of the next session thereof, a copy of the record in said suit, and
9 shall pay all costs that may be awarded by the said United States Circuit Court, if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall appear therein in said cause as may be required, then these presents shall cease, determine, and be void, otherwise to be of full force and effect.

MOBILE & MONTGOMERY RAILWAY COMPANY,
By EDW'D L. TYLER, *V. P.*
EDW'D L. TYLER.
JOSIAH MORRIS.

Filed in open court, March 3, 1879.
E. H. METCALF, *Clerk.*

MONDAY, *March 3d*, 1879.

Court met pursuant to adjournment.

L. C. JURY AND M. GILLIS, PARTNERS, &C.,
1511. *vs.*
THE MOBILE AND MONTGOMERY RAILWAY COMPANY.

This day came the parties, by their attorneys, and on motion of the defendant, the said defendant having filed its petition to transfer this cause to the Circuit Court of the United States for the Middle District of Alabama, and said defendant having given
10 bond as required by the act of Congress in such cases made

and provided, it is therefore considered by the court that this cause be transferred to the Circuit Court of the United States for the Middle District of Alabama, and it is ordered that the clerk of this court make out and transmit to said United States Circuit Court for the Middle District of Alabama a full and complete transcript under the seal of this court of all the proceedings and orders in this cause in this court.

STATE OF ALABAMA,
MONTGOMERY COUNTY.

I, E. H. Metcalf, clerk of the city court of Montgomery, do hereby certify that the foregoing pages numbered from one to , inclusive, contain a full, true, and correct transcript of the proceedings had and orders made in this court in the case of Jury & Gillis, for use of Factors' and Traders' Ins. Co. against the Mobile and Montgomery Railway Company as the same appears on file in this office. That by a petition and bond given according to law
11 this cause was transferred to the United States Circuit Court for the Middle District of Alabama, under approval of Judge John A. Minnis, on the 3d day of March, A. D. 1879.

Witness my hand and the seal of the said city court, this the 5th day of May, A. D. 1879.

[L S.] E. H. METCALF, *Clerk.*

Transcript & seal	5 25
Cl'k's fees	4 10
Sh'ff's fees	1 30
	10 65

Filed May 5th, 1879.

J. W. DIMMICK, *Clerk.*

Refiled by order of court this 6th day of May, A. D. 1879.

J. W. DIMMICK, *Clerk.*

Circuit Court of the United States for the Middle District of Alabama.

12 JUREY AND GILLIS, WHO SUE FOR THE USE OF Factors' and Traders' Insurance Company of New Orleans,
vs.
THE MOBILE AND MONTGOMERY RAILWAY COMPANY.

Pleas of Defendant.

1. The defendant for answer to the complaint says it is not guilty of the matters alleged therein.

2. For further answer to the complaint the defendant says that the plaintiffs, the said Jurey & Gillis, were paid the damages for

the recovery of which this suit is brought before the action was commenced.

CLOPTON, HERBERT & CHAMBERS,
Att'ys for Def't.

Filed by leave of the court this 31st day of May, 1881.
J. W. DIMMICK, *Clerk.*

Demurrer to Def't's 2nd Plea.

In the Circuit Court of the United States for the Middle District of Alabama.

JUREY & GILLIS, USE, &C.,
vs.
MOBILE AND MONTGOMERY R. WAY CO.

13 The plaintiffs demur to the second plea filed by the defendant, and assign as grounds of said demurrer:

1. That it is not averred in said plea that the alleged payment was made by the defendant or by any person for the defendant.

2. That it does not appear from said plea that the alleged payment was not made by the Factors' and Traders' Insurance Co., for whose use this suit is brought.

3. That it does not appear from said plea that the alleged payment to Jurey & Gillis was made before the Factors' and Traders' Insurance Co. became the owner of the cause of action and entitled to receive said damages.

D. S. TROY,
Att'y for Plf's.

Filed in open court this 31st day of May, 1881.
J. W. DIMMICK, *Clerk.*

MONDAY, *May* 30, 1881.

JUREY AND GILLIS
vs.
THE MOBILE AND MONTGOMERY RAILWAY COMPANY.

During the trial of this cause court adjourned until to-morrow morning at 10 o'clock.

14 *Judgment.*

TUESDAY, *May* 31, 1881.

JUREY AND GILLIS
vs.
THE MOBILE AND MONTGOMERY RAILWAY COMPANY.

This cause came on to be further heard this day, and by leave of the court the defendant filed its second plea—plea of payment; there-

upon the plaintiffs demurred to the said plea, which demurrer the court sustained. Thereupon came a jury of twelve good and lawful men, to wit: S. T. Frazer and eleven others, who, being duly elected, tried, and sworn, well and truly to try the issue joined between the parties, upon their oaths do say that they find for the plaintiffs and assess their damages at ten thousand three hundred and forty-four dollars and twenty-four cents ($10,344.24). It is therefore considered by the court that said plaintiffs recover of the said defendant the said sum of ten thousand three hundred and forty-four dollars and twenty-four cents ($10,344.24) and the costs in this behalf expended, for which execution may issue.

15 *Bill of Exceptions.*

United States of America, Circuit Court of the United States, at Montgomery, Ala., May term, 1881.

L. C. JUREY & M. GILLIS, PARTNERS UNDER the name and style of Jury & Gillis, who sue for the use of the Factors' and Traders' Ins. Co. of New Orleans, a corporation created and doing business in the State of Louisiana,
vs.
THE MOBILE AND MONTGOMERY RAILWAY Company.

In the Circuit Court of the United States, at Montgomery, Alabama.

Be it remembered that, at the above term of said court, the above-mentioned cause came on to be tried and the following proceedings were had: The defendant, before announcing ready, moved the court to strike out that portion of the answer of Thos. K. Scott to the first interrogatory in these words, "Mr. Jurey asked me if the road would be responsible, in the event the cotton burned on the platform, or on the cars, and I replied that it would
16 be in either event," on the ground that the contract of shipment was in writing, the evidence of said Scott showing that a bill of lading was in writing. But the court overruled the motion and refused to strike out the said portion of the answer, to which the defendant duly excepted. The defendant also, before the trial began, moved separately to strike out the following portions of the answers of Lewis C. Jurey to the written interrogatories propounded to him, to wit: "I visited T. K. Scott, the freight agent of the Mobile & Montgomery Railroad Co., at its office in Montgomery, and arranged with him to take two hundred and sixty-four bales of cotton through to New Orleans at two dollars per bale," on the grounds that the contract of shipment, as shown by the evidence of this witness and of T. K. Scott, was in writing; and, also, because the witness stated a conclusion and inference and not what was said between him & Scott, and also because not responsive to any

interrogatory. Also, to that portion of the answer to interrogatory one, in these words: "I asked him such question and he answered
17 that as soon as the cotton was delivered on the railroad platform that the cotton would be thereafter at the risk of the company," on like grounds that the contract of shipment was in writing, and also because the agent, Scott, had no authority to bind the def't company by such declarations. Also, the following portions of answer to interrogatory number four: "I contracted with the company, through its agent, Mr. Scott, to deliver the cotton in New Orleans at two dollars per bale, with the distinct understanding that it was at the railway company's risk as soon as delivered on its platforms at Montgomery," because, as above, the contract was in writing, and because not responsive to any interrogatory. Also the following: "After the cotton had been destroyed by fire I saw the bill of lading for the first time, and noticed that risk of fire was excepted," because, as the above contract was in writing and the evidence was illegal.

Also to the words "and that such was not our agreement," because irrelevant and illegal, the conversation being after the destruction of the cotton, as well as also on the ground that
18 the contract of shipment was in writing, and because not responsive to any interrogatory.

Also to that portion of the answer to fourth interrogatory, in the words, "I paid an outside rate of freight in consideration of having the cotton transported without any exceptions or conditions," because, as above, the contract was in writing and could not be varied by parol. Also to all that portion of the answer to the cross-interrogatory after the words "we have been paid," and to the end of said answer inclusive, because not responsive to the question and irrelevant to the allegations of the complaint.

To each portion and part of the answers, as above set forth, def't objected separately and severally, for the reasons above set forth, moved to exclude the same from the jury as evidence, but the court overruled each and every objection and permitted each part of said answers above separately set forth to go to the jury as evidence, and to each of such rulings of the court the def't separately excepted.

After the trial had begun, and while the depositions of Scott and Jurey were respectively being read, the def't again,
19 as the said several portions of the answers above separately set forth were reached, made the objections and motions to exclude from the jury above set forth separately to each of such portions, plff's counsel admitting that they had received regular notice before the trial to produce at the same the bill of lading alleged to have been given them by the def't for the shipment of the cotton in question, and the court overruled, as before, each of said motions to exclude, and to each such ruling the defendant separately and duly excepted.

To the complaint the def't filed two separate pleas. The pl'ffs took issue upon the first and demurred to the second plea, on the grounds set forth in the demurrer, which demurrer being considered by the court, was sustained, and said second plea was held bad, to which ruling of the court the def't duly reserved an exception.

The plaintiffs read to the jury the depositions of Thomas K. Scott and L. C. Jury and rested their case. Said depositions were as follows:

In the Circuit Court of the United States for the Middle District of Alabama.

JUREY & GILLIS, USE, &C.,
vs.
MOBILE AND MONTGOMERY RAILWAY CO.

Interrogatories to Thos. A. Scott.

Interrogatories to Thomas A. Scott, who resides in the city of Mobile, a witness on behalf of plaintiffs in said cause:

1. Were you the agent or in the employment of defendant at the City of Montgomery on 1st Nov'r, 1878; and, if so, do you know of a shipment of two hundred and sixty-four bales of cotton made by Crenshaw Hall, as agent for Jurey & Gillis, over defendant's road on or about Nov'r 1st, 1878?

2. If you know of said shipment, state whether you had any conversation with Mr. L. C. Jurey of said firm in reference to said cotton, or its loss or destruction or damage to it before the cotton left Montgomery; if so, state where the cotton then was, and what progress had been made in its shipment or delivery to the railway company for shipment? State where the conversation occurred, when it occurred, how it commenced, and all that was said on that subject, by yourself or Mr. Jurey, as fully as you can recollect?

3. Was the bill of lading for said cotton signed and delivered before or after said conversation with Mr. Jurey? Whose business was it at that time to give bills of lading or receipts of freight for shipment for defendant at Montgomery? In what capacity
21 were you employed by the defendant at that time, and what relation or connection was there, if any, between your duties as agent of the defendant and the person whose duty it was to receipt for freight received for shipment or to give bills of lading for it?

4. How was said cotton shipped, in box-cars or on flat cars; and if on flat cars, state whether it was covered or not? And, if covered, how and with what it was covered, and whether any and what precautions were taken to prevent its catching on fire while it was being transported on the cars? Please state the full particulars as

the 19th day of May, A. D. 1880, at my office, No. 36 St. Francis st., in the port of Mobile, State of Alabama, and that I have personal knowledge of said witness, and I am not of counsel or of kin to any of the parties in interest or in any manner interested in the result thereof. Witness my hand and seal this 18 day of May, 1880.

HANNIS TAYLOR, [SEAL.]
Commissioner.

UNITED STATES OF AMERICA.

Circuit Court of the United States for the Middle District of Alabama.

Commission to take Deposition of Scott.

To Hannis Taylor, Esq., who resides in the city of Mobile, Alabama: Know ye that we, having full faith in your prudence
27 and competency, have appointed you commissioner, and by these presence do authorize you, at such time and place as you may appoint, to call before you and examine Thomas A. Scott, who resides in the city of Mobile and State of Alabama, a witness in behalf of the plaintiffs in a case pending in the Circuit Court of the United States for the Middle District of Alabama, at Montgomery, wherein Jurey & Gillis, for use of, &c., are plaintiffs, and the Mobile and Alabama Railway Company is defendant, on oath to be by you administered, upon interrogatories and cross-interrogatories annexed to this commission; to take and certify the deposition of the witness, and return the same to our said circuit court with all convenient speed under your hand and seal.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of May, A. D. 1880.

Issued the 15th day of May, A. D. 1880.

[L. S.] J. W. DIMMICK,
Cl'k U. S. Cir. Ct., Mid. Dist. of Ala.

Published by general order of the court this 26th May, A. D. 1880.

J. W. DIMMICK, *Clerk.*

28 In the Circuit Court of the United States for the Middle District of Alabama.

JUREY & GILLIS, USE, &C.,
vs.
MOBILE & MONTGOMERY RAILWAY CO.

Interrogatories to L. C. Jurey.

Interrogatories to L. C. Jurey, one of the plaintiffs in said cause, who resides in the city of New Orleans, witness on behalf of plaintiffs.

1. Are you one of the nominal plaintiffs in this suit? Do you know of a shipment of 264 bales of cotton by C. Hall, as agent for Jurey & Gillis, on or about 1st Nov'r, 1878, over defendant's railroad from the city of Montgomery, Ala., consigned to Jurey & Gillis at New Orleans?

2. If you recollect such shipment, state where you were at that time; and if you had any conversation with any officer or agent of defendant in reference to said cotton or its loss or damage to it before the cotton left Montgomery, state when, where, and with whom you had such conversation and what was said? State what progress had been made in shipping the cotton or delivering it for shipment, and the facts and circumstances which led to the conversation, and all that was said on the subject?

29 3. How much of said cotton was received by Jurey & Gillis and when was it received, and when by ordinary course of transportation ought the cotton to have reached New Orleans? How much of the cotton was never delivered to or received by Jurey & Gillis, and what was the value at the time it ought to have reached New Orleans of the cotton not delivered?

4. State anything else you may know material to the cause?

D. S. TROY,
Att'y for Pl'ffs.

The defendant objects to so much of the 2d direct interrogatory as is in these words: "and what was said," on the ground that the contract is in writing, and the evidence called for is illegal and inadmissible.

Without waiving this objection, defendant propounds to witness the following cross-interrogatories:

Cross-Interrogatories to L. C. Jurey.

Cross-Interrogatory 1. Was not a bill of lading given by defendant for said cotton? If yea, attach the bill of lading to

30 your answers? If you do not attach it, state why you do not? What amount per bale was paid to defendant for the transportation of said cotton from Montgomery to New Orleans? Have not Jurey & Gillis been paid for all of said cotton which they did not receive?

CLOPTON, HERBERT & CHAMBERS,
Att'ys for Def't.

Service accepted, notice and affidavit waived, consent that commission issue to A. Hero.

CLOPTON, HERBERT & CHAMBERS,

Filed May 15, 1880.

J. W. DIMMICK, *Clerk.*

Commission to take Deposition of L. C. Jurey.

UNITED STATES OF AMERICA.

Circuit Court of the United States for the Middle District of Alabama.

To Andrew Hero, Jr., New Orleans, La.

Know ye, that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize you, at such time and place as you may appoint, to call before you and examine L. C. Jurey, who resided in the city of New Orleans, State of Louisiana, as witness in behalf of
31 plaintiffs in a case pending in the Circuit Court of the United States for the Middle District of Alabama, at Montgomery, wherein Jurey & Gillis, for the use of, &c., are plaintiffs, and the Mobile and Montgomery Railway Company is defendant, on oath to be by you administered upon interrogatories and cross-interrogatories annexed to this commission; to take and certify the deposition of the witness, and return the same to our said Circuit Court with all convenient speed, under your hand and seal.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of May, A. D. 1880.

Issued 15th day of May, A. D. 1880.

[L. S.] J. W. DIMMICK,
Clerk U. S. Cir. Ct. Mid. Dist. of Alabama.

Deposition of L. C. Jurey.

Deposition of Lewis C. Jurey, of New Orleans, Louisiana, a witness sworn and examined under and by virtue of a commission issued out of the Circuit Court of the United States for the Middle District of Alabama, in a certain cause therein depending
32 between Jurey & Gillis, for the use, &c., plaintiffs, and the Mobile and Montgomery Railway Company as defendant.

Said Lewis C. Jurey, of New Orleans, La., being first duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

1st. To the first interrogatory he saith:

I am; I do know of such shipment, but made by me.

2d. To the second interrogatory he saith:

I was in Montgomery, Alabama, at the time of said shipment. I visited T. K. Scott, the freight agent of the Mobile and Montgomery Railway Company, at its office in Montgomery, and arranged with him to take the two hundred and sixty-four bales of cotton through to New Orleans at two dollars per bale. When the cotton was ready for shipment and hauling to the railroad depot, I again visited Mr. Scott, at the company's office in Montgomery, in

order to ascertain when my risk ceased, and that of the company began. I asked him such question, and he answered that as soon as the cotton was delivered on the railroad's platform, that the cotton would thereafter be at the risk of the company. This
33 was about the first of November, 1878, and after I had contracted with the company through him to take the cotton, but before any of the cotton had been hauled from the warehouse, or any of it delivered to the railroad.

To the third interrogatory he saith:

Sixty-seven bales; about the fourth of November, 1878. By ordinary course of transportation all of it ought to have been in New Orleans on third or fourth of November, A. D. 1878. One hundred and ninety-seven bales of cotton were never delivered to or received by Jurey and Gillis, though the R. R. Co. received all of it. The value of the sixty-seven bales that were received were sold at nine and a quarter cents per pound; and the one hundred and ninety-seven bales of cotton that were not delivered were worth the same price (nine and a quarter cents per pound) at the time same ought to have reached New Orleans.

To the fourth interrogatory he saith:

I never saw any bill of lading for the cotton until after it was burnt; and took none myself. I contracted with the com-
34 pany, through its agent, Mr. Scott, to deliver the cotton in New Orleans for two dollars per bale, with the distinct understanding that it was at the railway company's risk as soon as delivered on its platforms at Montgomery. After the cotton had been destroyed by fire, I saw the bill of lading for the first time, and noticed that risk by fire was excepted. I immediately went to Mr. Scott and called his attention to it, and that such was not our agreement. The bill of lading was obtained by C. Hall, the broker in the premises. I paid an outside rate of freight in consideration of having the cotton transported without any exceptions or conditions.

To the first cross-interrogatory he saith:

One was, but not to me or in accordance with the agreement that I had made, as above related. I have it not, and believe that my attorneys herein have it, hence I cannot annex it. We paid two dollars per bale for such as was delivered, viz., sixty-seven bales, and have paid nothing for the rest (197), as same has never been delivered. We have been paid by the Factors' and Traders'
35 Insurance Company of this city by reason of its having been covered under our open policy, and this suit is for the use and benefit of that company as subrogee of our rights, because we reinsured the cotton in that company notwithstanding that defendant had guaranteed its delivery.

L. C. JUREY.

I, Andrew Hero, Jr., the commissioner in said commission named, do hereby certify that the evidence of the witness, Lewis C. Jurey,

was taken down under oath and subscribed by him in my presence on the eighteenth day of May, A. D. 1880, at my office in the city of New Orleans, State of Louisiana, that I have personal knowledge of said witness, and that I am not of counsel in the cause or of kin to any of the parties in interest or in any manner interested in the result thereof.

Witness my hand and seal at New Orleans, this 18th May, 1880, at New Orleans, Louisiana.

[SEAL.] ANDREW HERO, JR.,
Commissioner.

Published by general order of court this 26th day of May, A. D. 1880.

J. W. DIMMICK, *Clerk.*

36 The defendant then introduced one Morgan, who being sworn as a witness, testified that he was engineer upon deft's train upon which the cotton in question was destroyed by fire; that this was on or about the second day of November 1878, between Montgomery and Mobile; that said train was made up of eight or ten box cars next to the engine and tender; that he did not know what was in said box cars; that behind them were four flat cars loaded with cotton not covered by any tarpaulin, and next to them and last of the train was a cab car in which the conductor rode; that there were two men with buckets of water besides the conductor and brakeman to look after and watch the cotton; that while the train was running on a down grade, and had been for some minute or more, at the rate of twenty miles an hour, and while the engine was not emitting any sparks, because it was not being used, the train running with its own momentum, the alarm or signal to halt was given by the bell, and on looking back witness discov-
37 ered the cotton was on fire; that brakes were at once applied, the engine reversed, and every means known to railroad men resorted to to stop the train; that notwithstanding these efforts the train, by reason of the down grade and its velocity, ran some half a mile and about a minute and a half before he could stop it; that he then sent his fireman back to detach the box cars from the flat cars, which being done, he moved the box cars far enough forward to be out of danger, and then went back to aid in saving the burning cotton, and found that the conductor and brakeman had detached and removed the cab car out of danger; that he and the other employees did what they could to save the cotton, taking poles and trying to push the cotton from the cars, but the fire was too hot for them and the burning cars and cotton were consumed.

This witness also said that the woods through which the train was running when the fire occurred were on fire, and the woods were frequently burning along the line of deft's road at that time of the year. The brakeman who was on said train was also

38 examined, and testified substantially the same as the engineer. The def't then introduced Crenshaw Hall, who testified that he was a cotton broker at Montgomery, Ala., at the time of the transaction inquired about, and acted therein for L. C. Jury, delivering for him the cotton in question at defendant's depot; that he did not make any agreement or have any understanding with the def't as to the price of shipping the cotton, but simply sent the same to the depot by order of Mr. Jury, to be shipped to New Orleans; that when the cotton was all delivered at the depot he received a bill of lading therefor. Jury told witness he, Jury, would go and make the contract, as he thought he could get better rates.

Def't then placed in witness' hands a bill of lading and an account, of which the following are copies:

No. ——. Ac. Jurey & Engster. Original.

To be delivered to shipper.

Mobile and Montgomery Railway Company.

Received from C. Hall two hundred and sixty-four (264)
39 bales cotton ——— of which are in bad order, marked as stated below, and consigned to Jurey & Gillis, to be transported and delivered to same, New Orleans, at the rate of ———. And, in consideration of above rate, it is agreed upon and distinctly understood that the shipper releases the Mobile & Montgomery Railway Co. and connections from all liabilities for any loss or damage that may occur from the bursting of ropes and bagging, old damage, wet, or from fire while upon their roads.

No. Bales.	Marks.	Weight.
148	E G L. A.	
73	E G L. B.	
43	E G L. C.	
264		

Freight.

To be collected.....
Prepaid.....
Charges.....
Total .....

Frt. $2.00 bale.

M. H. SAYRE, *Agent.*

Duplicate.

Mobile & Montgomery Railroad Co., Dr.
To Mess. Jurey & Gillis.

For 197 b. c. burnt in lot of 264 bales ship'd from Montgomery, Ala., Nov'r 1st, 1878, and consigned to Mess. Jurey & Gillis, New Orleans. La.,

Weighing 96,936 lbs., @ 8⅝	8,360 73
Freight on 197 b. c., @ 1.12c	220 64
	8,581 37

The above is the correct weights and value of the 197 b. c. on the day of shipment.

E. & O. E. CRENSHAW HALL.

Montgomery, Ala., Nov'r 9, '78.

And the witness having examined the same, testified that the bill of lading was signed in the handwriting of Sayre, a freight clerk at deft's depot at Montgomery; that it was either the same or a duplicate of that received by him when he had sent all said cotton to the depot; that an original and a duplicate were issued to him at the same time, one of which he gave to Jury and the other he attached to said claim; that said account was made out in his
41 office and was signed by him, and that the said account, with the bill of lading attached, was presented by him to the def't in behalf of Jury & Gillis on the day it bears date; that it was correct; that the price mentioned there was the value of the cotton at Montgomery at the time; that the deduction on account of freight was the proportionate share of freight of the def't company, rating the freight to New Orleans at two dollars per bale, the def't company's road extending only to Mobile, and not all the way to New Orleans. The def't then offered, and read as evidence to the jury, the said bill of lading and account above set forth.

Said Crenshaw Hall, on cross-examination by the pl'ffs, testified that Mr. Jury was in the city at the time that the cotton in controversy was being hauled to the depot; that at the time he, witness, received the bill of lading, his recollection was that said Jury was some ten miles from Montgomery, in the country, and that he did not return to the city of Montgomery until after the news had
42 come of the burning of the cotton. The foregoing was the substance of all the evidence in the case. There was no evidence showing the sum for which the said Factors' and Traders' Co. insured said cotton, or of the amount which they paid to Jury & Gillis on account of the loss of said cotton other than as contained in the depositions of said Jury.

The court of its own motion charged the jury that the position taken in argument by the counsel for defendant was not the law,

viz., that if they believed the plaintiffs, Jury & Gillis, before the beginning of this suit, had been paid by the Factors' and Traders' Insurance Company, as insurer, paying the loss they had insured against, and that the said Jury & Gillis had no interest in the recovery, then the said Insurance Co. was the real pl'ff in the case, and the burden of proof was on it to show the jury by satisfactory evidence how much it had so paid, and that if it failed to do so or to give the jury evidence to enable them to determine satisfactorily what its loss or damage was, then nothing more than nominal damages could be recovered in this case.

43 To this charge the defendant duly excepted at the time the same was given and in the presence of the jury.

The court also charged the jury of its own motion, that if the pl'ffs were entitled to recover, the measure of damages would be the value of the cotton at New Orleans, where it was to have been delivered, together with interest on said sum so ascertained at eight per cent. per annum from the time when the cotton ought to have been delivered; and to this charge the defendant duly excepted at the time and in the presence of the jury.

The pl'ffs by their counsel then asked the court to give the five following charges, numbered respectively from one to five, inclusive:

1. That the paper read in evidence by the defendant as a bill of lading contains no restriction upon the liability of the defendant as a common carrier.

2. If the jury find from the evidence that the paper read in evidence by the defendant as a bill of lading is on one of

44 the blanks used by the defendant in shipping cotton, and that the only consideration, as expressed in said paper, for the agreement to release the defendant from any loss or damage by fire, was the rate of freight to be paid by the shipper; and if the jury further find from the evidence that the rate of freight was left blank in said paper by the defendant or its agent when the same was executed and issued, because the defendant did not intend to claim the benefit of such release, the defendant cannot now claim any benefit from the same, and the omission to fill said blank with the rate of freight, if done for the reason above stated, was a waiver of the release by the defendant.

3. That the liability of the defendant as a common carrier, as fixed by the common law, could only be limited after an agreement to transport the cotton at a specified rate of freight was made by a contract based upon a sufficient consideration; and if the jury find from the evidence that the defendant, as a common carrier,

45 through Thos. K. Scott, its agent, had agreed with Jury & Gillis to transport the cotton in controversy from Montgomery to New Orleans for two dollars per bale freight, to be paid on delivery of the cotton at New Orleans, the defendant expressly assuming the risk of all loss or damage by fire, and that after this

agreement had been made, and pursuant to it, the cotton had been delivered to the defendant for transportation, the defendant then issued the bill of lading read in evidence by the defendant, without any further or other consideration, containing the agreement that the shipper released the defendant from loss or damage by fire, then such agreement was without consideration in law, and was not binding upon Jury & Gillis.

4. That if the jury find from the evidence that the defendant, as a common carrier, through Thos. K. Scott, its agent, agreed with Jury & Gillis to transport the cotton in controversy from Montgomery to New Orleans for two dollars per bale freight, to be paid on the delivery of the cotton at New Orleans, the defendant
46 expressly assuming the risk of all loss or damage by fire, and that after this agreement had been made, and pursuant to it, the cotton had been delivered to the defendant for transportation, the defendant then issued the bill of lading read in evidence, and that said bill of lading was afterwards delivered to L. C. Jury, one of said firm, and that said Jury, immediately on receipt of said bill of lading, notified defendant that the agreement to release the defendant from liability for loss or damage contained in said bill of lading was not in accordance with the agreement or understanding pursuant to which the cotton was shipped, and that Jury & Gillis did not assent to the agreement to release the defendant from loss or damage, as set forth in said bill of lading, then the subsequent retention of said bill of lading by Jury & Gillis would not warrant the conclusion that Jury & Gillis had assented to the agreement expressed in the bill of lading to release the defendant from loss or damage, said Jury & Gillis being entitled and
47 authorized to retain the bill of lading as a receipt evidencing the shipment of the cotton.

5. That the assent of both parties, express or implied, is necessary to make a contract, and unless the jury find from the evidence that Jury & Gillis assented expressly or by implication to the agreement expressed in the bill of lading read in evidence, to release the defendant from liability for loss or damage by fire, then such agreement formed no part of the contract between the parties in respect to the shipment of the cotton in controversy.

The court gave each of said five charges to the jury separately, and to the giving of each the defendant separately and severally excepted at the time each was given and in the presence of the jury.

The defendant asked the court separately to give each of the following charges, numbered from two to five, inclusive, all of said charges being in writing, to wit:

2. If the jury find from the evidence that Jurey & Gillis
48 insured said cotton in and by the Factors' and Traders' Insurance Company of New Orleans, for whose use this suit is brought, then, upon the loss of the cotton by fire, and payment

of the insurance money by said insurance company to Jurey & Gillis, then said insurance company was subrogated to the rights of Jurey & Gillis, and can maintain a suit in the name of Jurey & Gillis for their use to recover the amount paid by them to Jurey & Gillis; but upon these facts the plaintiffs cannot recover under the complaint in this case, and if the jury find such to be the facts, they must find for the defendant.

3. If the jury find from the evidence that Jurey & Gillis insured said cotton in and by the Factors' and Traders' Insurance Company of New Orleans, for whose use this suit is brought, the said Factors' and Traders' Insurance Company, upon the loss of the cotton and payment of the insurance money to Jurey & Gillis, cannot recover against the defendant any more than the amount paid by them to Jurey & Gillis. The burthen of proving the amount
49 paid by said insurance company to Jurey & Gillis is upon the plaintiffs, and there being no evidence of the amount paid by said insurance company to Jurey & Gillis, the jury cannot find for the plaintiffs any more than nominal damages.

4. If the jury find from the evidence that Jurey & Gillis were paid by the Factors' and Traders' Insurance Company (for whose use this suit is brought) before this suit was brought for the damages sustained by Jurey & Gillis by the burning of the cotton, then the plaintiffs cannot recover in this action and under the complaint in this case.

5. If before the commencement of this suit the plaintiffs, Jurey & Gills, received and accepted payment for any and all loss sustained by them in respect to the cotton, there can be no recovery in this case on their behalf and for their use and for their satisfaction; but if there is any recovery allowable in this case, it is only for the use and benefit of the insurance company (for whose use this suit was brought), and must be limited and confined to such amount
50 as the evidence convinces the jury was paid by said insurance company, and interest on that amount from the time it was paid; and if the facts be as supposed in this charge, and the evidence does not prove the amount which may have been paid by the insurance company, nor enable the jury to ascertain satisfactorily the amount which was so paid, then upon this state of facts the verdict, if for the plaintiffs, should be for nominal damages and no more.

The court refused separately to give each of said charges, holding the same to be improper, and to each separate refusal the defendant separately excepted at the time of such refusal and in the presence of the jury. When the jury returned their verdict into court it was stated orally to the court by the foreman of the jury that in estimating the amount of damages the jury deducted from the value of the cotton in New Orleans two dollars per bale for freight; and the defendant now tenders this its bill of exceptions, which is signed and sealed by the presiding judge in term time.

51 Witness the Hon. John Bruce, judge of the District Court of the United States for the District of Alabama, presiding in said circuit court at said trial.

JOHN BRUCE, *Judge.*

Filed July 19, 1881.

J. W. DIMMICK, *Clerk.*

Writ of Error.

UNITED STATES OF AMERICA.

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Middle District of Alabama, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you between L. C. Jurey and M. Gillis, partners, using the firm-name of Jurey & Gillis, who sue for the use of the Factors' and Traders' Insurance Company of New Orleans, plaintiffs, and the Mobile and Montgomery Railway Company, defendant, a manifest error hath happened, to the great damage of the said the
52 Mobile and Montgomery Railway Company, defendant, as by the complaint appears: we being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if a judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court, the 4th June, A. D. 1881.

[L. S.] J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Alabama.

53 Allowed.

JOHN BRUCE, *Judge.*

Filed this 4th day of June, A. D. 1881.

J. W. DIMMICK, *Clerk.*

Citation.

UNITED STATES OF AMERICA.

The United States of America to L. C. Jurey and M. Gillis, partners using the firm name of Jurey & Gillis, who sue for the use of

the Factors' & Traders' Insurance Company of New Orleans, or to Messrs. Troy and Tompkins, attorneys of record for the said Jurey & Gillis, who sue for the use of the said Factors' & Traders' Insurance Company of New Orleans.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court for the Middle District of Alabama, wherein the Mobile and Montgomery Railway Company is plaintiff in error and you are defendants in
54 error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Bruce, Judge of the District Courts of the United States for the State of Alabama, sitting as circuit judge, in open court, this 4th day of June, A. D. 1881.

JOHN BRUCE, *Judge.*

Received in office June 4, 1881.

M. C. OSBORN,
U. S. Marshal.

Executed by serving a copy of the within on D. S. Troy, in Montgomery, Ala., June 4, 1881.

M. C. OSBORN,
U. S. Marshal.
By F. JOST, *Dep.*

Filed June 4th, 1881.

J. W. DIMMICK, *Clerk.*

Supersedeas Bond.

55 Circuit Court of the United States for the Middle District of Alabama, at Montgomery, Alabama.

Know all men by these presents, that the Mobile & Montgomery Railway Co., a corporation under the laws of Alabama, and——— are held and firmly bound unto M. Gillis and L. C. Jurey, merchants and partners doing business as partners, in the city of New Orleans, Louisiana, under the name and style of Jury & Gillis, who sue for the use of the Factors' and Traders' Insurance Company of New Orleans, in the full and just sum of fourteen thousand dollars, to be paid to the said Jurey & Gillis, their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas, lately, at a term of the Circuit Court of the United

111-584

OFFICE SUPREME COURT U.S.
FILED
APR 8 1884
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

NO. 320.

MOBILE AND MONTGOMERY RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

L. C. JUREY AND M. GILLIS, PARTNERS UNDER THE STYLE OF JUREY & GILLIS—USE OF FACTORS' & TRADERS' INSURANCE COMPANY, DEFENDANTS IN ERROR.

THOMAS G. JONES AND DAVID CLOPTON,

ATTORNEYS FOR PLAINTIFF IN ERROR.

W. D. BROWN & CO., PRINTERS AND BINDERS, MONTGOMERY, ALA.

Supreme Court of the United States.

OCTOBER TERM, 1883.

NO. 320.

MOBILE AND MONTGOMERY RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

L. C. JUREY AND M. GILLIS, PARTNERS UNDER THE STYLE OF JUREY & GILLIS—USE OF FACTORS' & TRADERS' INSURANCE COMPANY, DEFENDANTS IN ERROR.

This is a writ of error to the United States Circuit Court for the middle district of Alabama, sued out in behalf of the Mobile & Montgomery Railway Company, Plaintiff in error, against the defendants in error, Jurey & Gillis, who sue for the use of the Factors' & Traders' Insurance Company of New Orleans.

The defendants in error, Jurey & Gillis, brought their action against the Mobile & Montgomery Railway Company to recover Twelve Thousand Dollars "as damages for the failure to deliver certain goods, viz: One hundred and ninety seven bales of cotton weighing 96,936 pounds received by the defendant as a common carrier, to be delivered to the plaintiffs at New Orleans, Louisiana, for a reward, which it failed to do."

The defendant pleaded "not guilty," and a special plea that "the plaintiffs, said Jurey & Gillis, were paid the damages for the recovery of which this suit was brought, before the action was commenced."

The plaintiff demurred to this special plea, because: First, the plea does not show the payment was made by defendant, or any one for it; Second, that it does not appear that the alleged payment was not made by the Factors' & Traders' Insurance Company, for whose use the suit is brought. Third, it does not appear that the alleged payment to plaintiffs was made before the Factors' & Traders' Insurance Company became the owner of the cause of action and entitled to receive said damages.

The court sustained the demurrer to this special plea, and the cause was tried on issue joined on the first plea, and resulted in verdict and judgment for the plaintiffs, for $10,344 25, and costs. The errors assigned relate to the ruling of the court upon the demurrer, and rulings in the admission of evidence, and the giving of charges by the court of its own motion and at the instance of plaintiffs, and the refusal to give charges requested by the defendant.

When the case came on to be tried and before the defendant announced ready, the defendant moved to strike out a portion of the answer of Thos. K. Scott to one of the interrogatories propounded to him by the plaintiff, which answer was as follows: "Mr. Jurey asked me if the roads would be responsible in event the cotton burned on the platform, or on the cars, and I replied that it would in either event," [see page 11 of printed transcript] on the grounds that the contract of shipment was in writing; the evidence of said Scott showing that a bill-of-lading was in writing. The court overruled the motion and refused to strike out this portion of the answer, and the defendant excepted.

Defendant also, before entering on the trial, moved separately to strike out the following portions of the answers of Lewis C. Jurey to written interrogatories propounded to him, to-wit: "I visited T. K. Scott, the freight agent of the Mobile & Montgomery Railroad Company, at its office in Montgomery, and arranged with him to take two hundred and sixty-four bales of cotton through to New Orleans at two dollars per bale,"—on the grounds that the contract of

shipment, as shown by the evidence of this witness and of T. K. Scott, was in writing; and, also, because the witness stated a conclusion and inference, and not what was said between him and Scott; and, also, because not responsive to any interrogatory. Also, to that portion of the answer to interrogatory one, in these words: "I asked him such question and he answered that as soon as the cotton was delivered on the railroad platform, that the cotton would be thereafter at the risk of the Company,"—on like grounds that the contract of shipment was in writing, and also because the agent, Scott, had no authority to bind the defendant Cmpany by such declarations. Also, the following portions of answer to interrogatory number four: "I contracted with the Company, through its agent, Mr. Scott, to deliver the cotton in New Orleans at two dollars per bale, with the distinct understanding that it was at the Railway Company's risk, as soon as delivered on its platforms at Montgomery,"—because, as above, the contract was in writing, and because not responsive to any interrogatory Also the following: "After the cotton had been destroyed by fire I saw the bill-of-lading for the first time, and noticed that risk of fire was excepted," because, as above, contract was in writing, and the evidence was illegal.

Also to the words "and that such was not our agreement;" because irrelevent and illegal, the conversation being after the destruction of the cotton; as well as also on the grounds that the contract of shipment was in writing, and because not responsive to any interrogatory.

Also to that portion of the answer to fourth interrogatory, in the words, "I paid an outside rate of freight in consideration of having the cotton transported without any exceptions or conditions,"—because, as above, the contract was in writing, and could not be varied by parol. Also to that portion of the answer to the cross-interrogatory after the words "we have been paid," and to the end of said answer inclusive, because not responsive to the question and irrelevant to the allegations of the complaint.

To each portion and part of the answers, as above set forth, defendant objected separately and severally, for the reasons above set forth, moved to exclude the same from the jury as evidence; but the court overruled each and every objection and permitted each part of said answers, above separately set forth, to go to the jury as evidence, and to each of such rulings of the court the defendant separately excepted.

After the trial had begun, and while the depositions of Scott and Jurey were respectively being read, the defendant again, as the said several portions of the answers above separately set forth were reached, made the objections and motions to exclude from the jury above set forth separately to each of such portions, plaintiff's counsel admitting that they had received regular notice before the trial to produce at the same the bill-of-lading alleged to have been given them by the defendant for the shipment of the cotton in question, and the court overruled, as before, each of said motions to exclude, and to each such ruling the defendant separately and duly excepted."

The plaintiffs then read to the jury the depositions of Thos. K. Scott and L. C. Jurey, and rested their case.

Scott's answers to the interrogatories propounded to him are found on pages ten to eleven of printed transcript. The substance of Scott's deposition is, that he was the agent of the defendant, at the time of the shipment of the two hundred and sixty-four bales of cotton by Crenshaw Hall, as agent for plaintiffs. That in a conversation with Jurey, while some of the cotton was on the platform, and possibly some of it had been loaded, witness in answer to a question of Jurey, told him the Company would be responsible in event the cotton burned on the platform, or in the cars. This conversation took place before the signing of the bill-of-lading. It was the business of Scott and his clerks to to give bills-of-lading and receipts for freight. The cotton was shipped on flat cars, and none of it was covered. To prevent its taking fire, the cotton was placed as far as pos-

sible from the engine. Men were stationed on each car to watch the cotton, and to extinguish the sparks with wet cotton and buckets of water provided for that purpose. This was done on all the cars; and in addition to these extra precautions, all the regular train men were strictly enjoined to exercise special care and watchfulness over cotton loaded on open cars. Scott's recollection was that the freight from Montgomery to New Orleans was two dollars per bale, but he did not recollect whether it was prepaid or not. He says further that the bill-of-lading was not given until after all the cotton had been received.

L. C. Jurey deposed in substance, (see printed transcript, p. 14–15), that he was one of the firm of Jurey & Gillis. That he was in Montgomery at the time of the shipment, and arranged with Scott to take the 264 bales of cotton through to New Orleans at two dollars per bale. He visited Scott at the company's office in Montgomery, and, when the cotton was ready for shipment, and being hauled to the railroad depot, in order to ascertain when his risk ceased, that of the company began, asked him such questions, and Scott answered, "as soon as the cotton was delivered on the railroad platform the cotton would thereafter be at the risk of the company." He says this took place before any cotton had been hauled from the warehouse and delivered to the railroad. One hundred and ninety-seven bales of the shipment had never been received by Jurey & Gillis. The value of the sixty-seven bales received by them was nine and a quarter cents a pound, and the value of the remaining bales was the same at the time same ought to have reached New Orleans. He took no bill of lading himself, and never saw any until after the cotton was burned. He contracted with Scott, the agent, to deliver the cotton in New Orleans for $2.00 a bale, at the company's risk after it was delivered on the platform. When he saw the bill of lading for the first time, he noticed that risk by fire was excepted, and called Scott's attention to it. The bill of lading was obtained by C. Hall, the broker in the premises. Jurey further

deposes that he paid an outside rate of freight in consideration of having the cotton transported without any exceptions or conditions. He says that bill of lading was given, but not to him or in accordance with the agreement that he had made. He says further, that he paid two dollars per bale for such of the cotton as was delivered, and nothing for the remainder. In answer to the question, "Have not Jurey & Gillis been paid for all of said cotton which they did not receive?" the witness deposed, "We have been paid by the Factors & Traders Insurance Co., of this city, by reason of its having been covered under our open policy, and this suit is for the use and benefit of that Company as subrogee of our rights, because we reinsured the cotton in that company notwithstanding that the defendant had guaranteed its delivery."

The defendant introduced one Morgan, who was the engineer upon the train on which the cotton was destroyed. See page 16 of the printed transcript for his testimony. Morgan testified in substance that his train "was made up of eight or ten box cars next to the engine; that behind these were four flats loaded with cotton, not covered by tarpaulins, and next to them, and last of the train, was a cab car in which the conductor rode. That there were two men with buckets of water, besides the conductor and brakemen, to watch the cotton. While running down grade at about twenty miles an hour, and when the engine was not emitting any sparks, the signal to halt was given by the bell, and witness discovered the cotton was on fire. Every effort was made to stop the train as soon as possible, and when this was done, he and the other employees did what they could to save the cotton; but the fire was too hot, and the burning cars and cotton were consumed. He also testified that the woods through which the train was running when the fire occurred, were on fire, and that the woods were frequently burning along defendant's road at that time of the year. The brakeman on the train was examined and testified substantially as the engineer.

The defendant then introduced Crenshaw Hall, who was a cotton broker, and acted in the transaction for Jurey, delivering the cotton for him at defandant's depot. Hall testified that he made no agreement and had no understanding as to the price of shipping the cotton, but sent it to the depot by order of Jurey. When all the cotton was delivered he received the bill of lading. Jurey informed the witness that he, Jurey, would make the contract, as he thought he could get better rates. A bill of lading and an account presented to the defendant, in favor of Jurey & Gillis by said Hall, were then introduced (which may be found on pages 17 and 18 of printed transcript), and proved by the witness Hall, who stated reasons for making out the account as it was rendered. He testified that Jurey was out of town when Hall received the bill of lading, and did not return until after the news had come of the burning of the cotton. The bill of lading so introduced showed that the freight was two dollars per bale, and that the company had received from Hall two hundred and sixty-four bales of cotton consigned to Jurey & Gillis to be delivered at New Orleans. It contained this clause: "And in consideration of above rate, it is agreed upon and distinctly understood that the shipper releases the Mobile and Montgomery Railroad Company and connections from all liabilities for any loss or damage that may occur from the bursting of ropes and bagging, old damage, wet, or from fire while upon their roads." This bill of lading was signed by Sayre, agent of defendant.

The bill of exceptions recites that this was substantially all the evidence, and that "there was no evidence showing the sum for which the said Factors and Traders Co. insured said cotton, or of the amount which they paid to Jurey & Gillis on account of the loss of said cotton, other than as contained in the deposition of said Jurey."

The court of its own motion charged the jury that the position taken in argument by counsel for the defendant was not the law, to-wit: "If they believed the plaintiff, Jurey & Gillis, before the beginning of this suit, had been

paid by the Factors & Traders Insurance Company, as insurer, paying the loss they had insured against, and that the said Jurey & Gillis had no interest in the recovery, then the said Insurance Co. was the real plaintiff in the case, and the burden of proof was on it to show the jury by satisfactory evidence how much it had so paid, and that if it failed to do so, or to give the jury evidence to enable them to determine satisfactorily what its loss or damage was, then nothing more than nominal damages could be recovered in this case."

The defendant duly excepted to this charge at the time it was given.

The court further charged the jury of its own motion, that if the plaintiffs were entitled to recover, the measure of damages would be the value of the cotton at New Orleans, where it was to have been delivered, together with interest on said sum so ascertained, at eight per cent. per annum, from the time when the cotton ought to have been delivered.

The defendant duly excepted to this charge at the time.

The court, at the instance of plaintiffs' counsel, gave the five following charges, numbered respectively from one to five inclusive:

"1. That the paper read in evidence by the defendant as a bill of lading contains no restriction upon the liability of the defendant as a common carrier.

"2. If the jury find from the evidence that the paper read in evidence by the defendant as a bill of lading in one of the blanks used by the defendant in shipping cotton, and that the only consideration, as expressed in said paper, for the agreement to release the defendant from any loss or damage by fire, was the rate of freight to be paid by the shipper; and if the jury further find from the evidence that the rate of freight was left blank in said paper by the defendant or its agent when the same was executed and

issued, because the defendant did not intend to claim the benefit of such release, the defendant cannot now claim any benefit from the same, and the omission to fill said blank with the rate of freight, if done for the reason above stated, was a waiver of the release by the defendant.

"3. That the liability of the defendant as a common carrier, as fixed by the common law, could not be limited after an agreement to transport the cotton at a specified rate of freight was made by a contract based upon a sufficient consideration; and if the jury find from the evidence that the defendant, as a common carrier, through Thos. K. Scott, its agent, had agreed with Jury & Gillis to transport the cotton in controversy from Montgomery to New Orleans for two dollars per bale freight, to be paid on delivery of the cotton at New Orleans, the defendant expressly assuming the risk of all loss or damage by fire, and that after this agreement had been made, and pursuant to it, the cotton had been delivered to the defendant for transportation, the defendant then issued the bill of lading read in evidence by the defendant, without any further or other consideration, containing the agreement that the shipper released the defendant from loss or damage by fire, then such agreement was without consideration in law, and was not binding upon Jury & Gillis.

"4. That if the jury find from the evidence that the defendant, as a common carrier, through Thos. K. Scott, its agent, agreed with Jury & Gillis to transport the cotton in controversy from Montgomery to New Orleans for two dollars per bale freight, to be paid on the delivery of the cotton at New Orleans, the defendant expressly assuming the risk of all loss or damage by fire, and that after this agreement had been made, and pursuant to it, the cotton had been delivered to the defendant for transportation, the defendant then issued the bill of lading read in evidence, and that said bill of lading was afterwards delivered to L. C. Jury, one of said firm, and that said Jury, immediately on receipt of said

bill of lading, notified defendant that the agreement to release the defendant from liability for loss or damage contained in said bill of lading was not in accordance with the agreement or understanding pursuant to which the cotton was shipped, and that Jury & Gillis did not assent to the agreement to release the defendant from loss or damage, as set forth in said bill of lading, then the subsequent retention of said bill of lading, by Jury & Gillis would not warrant the conclusion that Jury & Gillis had assented to the agreement expressed in the bill of lading to release the defendant from loss or damage, said Jury & Gillis being entitled and authorized to retain the bill of lading as a receipt evidencing the shipment of the cotton.

"5. That the assent of both parties, expressed or implied, is necessary to make a contract, and unless the jury find from the evidence that Jury & Gillis assented expressly or by implication to the agreement expressed in the bill of lading read in evidence, to release the defendant from liability for loss or damage by fire, then such agreement formed no part of the contract between the parties in respect to the shipment of the cotton in controversy."

The court gave each of said five charges to the jury separately, and to the giving of each the defendant separately and severally excepted at the time each was given and in the presence of the jury.

The defendant asked the court separately to give each of the following charges, numbered from two to five, inclusive, all of said charges being in writing, to-wit:

"2. If the jury find from the evidence that Jury & Gillis insured said cotton in and by the Factors' and Traders' Insurance Company of New Orleans, for whose use this suit is brought, then, upon the loss of the cotton by fire, and payment of the insurance money by said insurance company to Jury & Gillis, said insurance company was subrogated to the rights of Jury & Gillis, and can maintain a suit in

the name of Jury & Gillis for their use to recover the amount paid by them to Jury & Gillis; but upon these facts the plaintifis cannot recover under the complaint in this case, and if the jury find such to be the facts, they must find for the defendant.

"3. If the jury find from the evidence that Jury & Gillis insured said cotton in and by the Factors' and Traders' Insurance Company of New Orleans, for whose use this suit is brought, the said Factors' and Traders' Insurance Company, upon the loss of the cotton and payment of the insurance money to Jury & Gillis, cannot recover against the defendant any more than the amount paid by them to Jury & Gillis. The burthen of proving the amount paid by said inrurance company to Jury & Gillis is upon the plaintiffs, and there being no evidence of the amount paid by said insurance company to Jury & Gillis, the jury cannot find for the plaintiffs any more than nominal damages.

"4. If the jury find from the evidence that Jury & Gillis were paid by the Factors' and Traders Insurance Company (for whose use this suit is brouht) before this suit was brought for the damages sustained by Jury & Gillis by the burning of the cotton, then the plaintiffs cannot recover in this action and under the complaint in this case.

"5. If before the commencement of this suit the plaintiffs, Jury & Gillis, received and excepted payment for any and all loss sustained by them in respect to the cotton, there can be no recovery in this case on their behalf and for their use and for their satisfaction; but if there is any recovery allowable in this case, it is only for the use and benefit of the insurance company (for whose use this suit was brought), and must be limited and confined to such amount as the evidence convinces the jury was paid by said insurance company, and interest on that amount from the time it was paid; and if the facts be as supposed in this charge, and the evidence does not prove the amount which may have been paid by the insurance company, nor enable the jury to ascertain satisfactorily the amount which was so paid, then upon this

state of facts the verdict, if for the plaintiffs, should be for nominal damages and no more.

"The court refused separately to give each of said charges, holding the same to be improper, and to each separate refusal the defendant separately excepted at the time of such refusal and in the presence of the jury. When the jury returned their verdict into court it was statad orally to the court by the foreman of the jury that in estimating the amount of damages the jury deducted from the value of the cotton in New Orleans two dollars per bale for freight.

ASSIGNMENT OF ERRORS.

THE MOBILE AND MONTGOMERY RAILWAY COMPANY, *Plaintiff in Error,*

vs.

L. C. JUREY AND M. GILLIS, *partners as* JUREY & GILLIS, *for the use of the Factors' and Traders' Insurance Company of New Orleans, Defendants in Error.*

SUPREME COURT OF THE UNITED STATES, October Term 1883.

Now at this Term before the Judges of the Supreme Court of the United States, at the capitol, in the City of Washington, comes the said Mobile and Montgomery Railroad Company, by David Clopton and Thomas G. Jones, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to-wit:

1st. The court below erred in sustaining the demurrer of plaintiffs to defendants plea of payment.

2nd. The court below erred in refusing to strike out, and also in refusing to exclude from the jury, on the motion of defendant, that part of the answer of Thos. K. Scott, which

is as follows: "Mr. Jurey asked me if the road would be responsible in event the cotton burned on the platform or on the cars, and I replied that it would be responsible in either event."

3rd. The court below erred in refusing to strike out, and also in refusing to exclude from the jury, on the motion of defendant, that portion of the answer of L. C. Jurey to interrogatories propounded to him, to-wit: "I visited T. K. Scott, the freight agent of the Mobile & Montgomery Railway Co., at its office in Montgomery, and arranged with him to take two hundred and sixty-four bales of cotton through to New Orleans at two dollars per bale."

4th. The court below erred in refusing to strike out, and also in refusing to exclude from the jury, on the motion of defendant, the following portion of the answer of L. C. Jurey to written interrogatories propounded him, to-wit: "I asked him such questions, and he answered that as soon as the cotton was delivered on the railroad's platform, that the cotton would thereafter be at the risk of the company."

5th. The court below erred in refusing to strike out, and also in refusing to exclude from the jury, on the motion of defendant, the following portion of the answer of L. C. Jurey to interrogatory numbered four, to-wit: "I contracted with the company, through its agent, Mr. Scott, to deliver the cotton in New Orleans at two dollars per bale, with the distinct understanding that it was at the railway company's risk as soon as delivered on its platform at Montgomery."

6th. The court below erred in refusing to strike out, and also in refusing to exclude from the jury, on the motion of defendant, that portion of the answer of L. C. Jurey, which is as follows, to-wit: "after the cotton had been destroyed by fire, I saw the bill of lading for the first time, and noticed that risk by fire was excepted."

7th. The court below erred in refusing to strike out, and also in refusing to exclude from the jury, on the motion of defendant, that portion of the answer of the witness, L. C. Jurey, to the fourth interrogatory, which was as follows, to-wit: "and that such was not our agreement."

8th. The court below erred in refusing to strike out, and also in refusing to exclude from the jury, on the motion of the defendant, that portion of the answer of L. C. Jurey to the fourth interrogatory, as follows, to-wit: "I paid an outside rate of freight in consideration of having the cotton transported without any exceptions or conditions."

9th. The court below erred in refusing to strike out, and also in refusing to exclude from the jury, that portion of the answer of the witness, L. C. Jurey, to the first cross-interrogatory propounded to him, to-wit: "We have been paid."

10th. The court below erred in the charge given the jury of its own motion, "that the position assumed by counsel for defendant was not the law, viz; that if they believed the plaintiff, Jurey & Gillis, before the beginning of this suit, had been paid by the Factors' & Traders' Insurance Company, as insurer, paying the loss they had insured against, and that the said Jurey & Gillis had no interest in the recovery, then the said insurance company was the real plaintiff in the case, and the burden of proof was on it to show the jury by satisfactory evidence how much it had so paid, and *that if* it failed to do so or to give the jury evidence to enable them to determine satisfactorily what its loss or damage was, then nothing more than nominal damages could be recovered in this case."

11th. The court below erred in charging the jury of its own motion, as follows, to-wit: "If the plaintiffs were entitled to recover, the measure of damages would be the value of the cotton at New Orleans, where it was to have been

delivered, together with interest on said sum so asce tained at eight per cent. per annum, from the time when the cotton ought to have been delivered."

12th. The court below erred in giving the first charge requested by the plaintiffs, to-wit: "That the paper read in evidence by defendant as a bill of lading contains no restriction upon the liability of the defendant as a common carrier."

13th. The court below erred in giving the second charge requested by the plaintiffs, to-wit: "If the jury find from the evidence that the paper read in evidence by the defendant as a bill of lading, is on one of the blanks used by the defendant in shipping cotton, and that the only consideration, as expressed in said paper, for the agreement to release the defendant from any loss or damage by fire, was the rate of freight to be paid by the shipper; and if the jury furthe find from the evidence that the rate of freight was left blank in said paper by the defendant or its agent when the same was executed and issued, because the defendant did not intend to claim the benefit of such release, the defendant cannot now claim any benefit from the same, and the omission to fill said blank with the rate of freight, if done for the reason above stated, was a waiver of the release by the defendant."

14th. The court below erred in giving the third charge requested by the plaintiffs, to-wit: "That the liability of the defendant as a common carrier, as fixed by the common law, could only be limited after an agreement to transport the cotton at a specified rate of freight was made by a contract based upon a sufficient consideration; and if the jury find from the evidence that the defendant, as a common carrier, through Thos. K. Scott, its agent, had agreed with Jurey & Gillis to transport the cotton in controversy from Montgomery to New Orleans for two dollars per bale freight, to be paid on delivery of the cotton at New Orleans, the defendant expressly assuming the risk of all loss or damage by

fire, and that after this agreement had been made, and pursuant to it, the cotton had been delivered to the defendant for transportation, the defendant then issued the bill-of-lading read in evidence by the defendant, without any further or other consideration, containing the agreement that the plaintiffs released the defendant from loss or damage by fire, then such agreement was without consideration in law, and was not binding upon Jurey & Gillis."

15th. The court below erred in giving the fourth charge requested by the plaintiffs, to-wit: "If the jury find from the evidence that the defendant, as a common carrier, through Scott, its agent, agreed with Jurey & Gillis to transport the cotton in controversy from Montgomery to New Orleans for two dollars per bale freight, to be paid on the delivery of the cotton at New Orleans, the defendant expresaly assuming the risk of all loss or damage by fire, and that after this agreement had been made, and pursuant to it, the cotton had been delivered to the defendant for transportation, the defendant then issued the bill-of-lading read in evidence, and that said bill-of-lading was afterwards delivered to L. C. Jurey, one of said firm, and that said Jurey, immediately on receipt of said bill-of-lading, notified defendant that the agreement to release the defendant from liability for loss or damage contained in said bill-of-lading was not in accordance with the agreement or understanding pursuant to which the cotton was shipped, and that said Jurey & Gillis did not assent to the agreement to release the defendant from loss or damage, as set forth in said bill-of-lading, then the subsequent retention of said bill-of lading by Jurey & Gillis would not warrant the conclusion the Jurey & Gillis had assented to the agreement expressed in the bill-of-lading to release the defendant from loss or damage, said Jurey & Gillis being entitled and authorized to retain the bill-of-lading as a receipt evidencing the shipment of the cotton."

16th. The court below erred in giving the fifth charge

requested by the plaintiffs, to-wit: "That the assent of both parties, express or implied, is necessary to make a contract, and unless the jury find from the evidence that Jurey & Gillis assented expressly or by implication to the agreement expressed in the bill-of-lading read in evidence, to release the defendant from liability for loss or damage by fire, then such agreement formed no part of the contract between the parties in respect to the shipment of the cotton in controversy."

17th. The court below erred in refusing to give the charge numbered two, to-wit: "If the jury find from the evidence that Jurey & Gillis insured said cotton in and by the Factors' & Traders' Insurance Company of New Orleans, for whose use this suit is brought, then, upon the loss of the cotton by fire, and payment of the insurance money by said insurance company to Jurey & Gillis, said insurance company was subrogated to the rights of Jurey & Gillis, and can maintain a suit in the name of Jurey & Gillis for their use to recover the amount paid by them to Jurey & Gillis; but upon these facts the plaintiffs cannot recover under the complaint in this case, and if the jury find such to be the facts, they must find for the defendant."

18th. The court below erred in refusing to give the charge numbered three, requested by the defendant, to-wit: "If the jury find from the evidence that Jurey & Gillis insured said cotton in and by the Factors' & Traders Insurance Company of New Orleans, for whose use this suit is brought, the said Factors' & Traders' Insurance Company, upon the loss of the cotton and payment of the insurance money to Jurey & Gillis, cannot recover against the defendant any more than the amount paid by them to Jury & Gillis. The burden of proving the amount paid by said insurance company to Jurey & Gillis is upon the plaintiffs, and there being no evidence of the amount paid by said insurance company to Jurey & Gillis, the jury cannot find for the plaintiffs any more than nominal damages."

19th. The court below erred in refusing to give the charge numbered four, reques;ed by the defendant, to-wit: "If the jury find from the evidence that Jurey & Gillis were paid by the Factors' & Traders' Insurance Company (for whose use this suit is brought) before this suit was brought for the damages sustained by Jurey & Gillis by the burning of the cotton, then the plaintiffs cannot recover in this action and under the complaint in this case."

20th. The court below erred in refusing to give the charge numbered five, requested by the defendant, to-wit: "If before the commencement of this suit the plaintiffs, Jurey & Gillis, received and accepted payment for any and all loss sustained by them in respect to the cotton, there can be no recovery in this case on their behalf and for their use and for their satisfaction; but if there is any recovery allowable in this case, it is only for the use and benefit of the insurance company (for whose use this suit was brought), and must be limited and confined to such amount as the evidence convinces the jury was paid by said insurance company, and interest on that amount from the time it was paid; and ff the facts be as supposed in this charge, and the evidence does not prove the amount which may have been paid by the insurance company, nor enable the jury to ascertain satisfactorily the amount which was so paid, then vpon this state of facts the verdict, if for the plaintiffs, should be for nominal damages and no more."

And the said Mobile & Montgomery Railway Company prays that the judgment aforesaid may be reversed, overruled, and altogether held for naught, and that it may be restored to all things which it hath lost by reason of said judgment.

DAVID CLOPTON,
THOS. G. JONES,
Attorneys for Plaintiff in Error.

ARGUMENT.

The bill of lading—(page 17 of record)—which was read in evidence by the defendant, was delivered to Crenshaw Hall, the broker of Jurey & Gillis, after the cotton had been delivered at the depot. This bill of lading was issued in duplicate, one of which was delivered by said Hall to Jurey, and after the cotton was destroyed, a claim against the defendant was made out, in behalf of Jurey & Gillis, for the destruction of the cotton, attached to the other duplicate of the bill of lading, and presented to the defendant, on behalf of Jurey & Gillis, on the 9th day of November, 1878, the cotton having been shipped on the first day of November, 1878. Parol evidence to vary this bill of lading, so far as it was a contract, was inadmissible.—The Lady Franklin, 8 Wall, 325-329. It is true, that Jurey testifies that he never saw this bill of lading until after the cotton was burned. Yet, after the cotton was burned, it was used as the basis of, and attached to the claim, which was presented to the defendant on behalf of Jurey & Gillis—thus recognizing and treating it as the contract by which the cotton was transported by the defendant.—See, also, The Delaware, 14 Wall. 579.

Parol evidence may have been admissible to show that the bill of lading was not the contract between the parties; but whether or not it was the contract, was a question which should have been left to the jury, and the effect of the parol evidence should have been thus limited; and if it was the contract, then the parol evidence was inadmissible to vary its terms.

To make the bill of lading a valid contract, it was not necessary that the consideration should have been stated therein, and the fact that the rate of freight was left in blank did not affect its validity as a contract. The charge asked by plaintiff, numbered two, is based upon the hypothesis, that the rate of freight was left blank, because the defendant did not intend to claim the benefit of the release therein stipulated, and that the omission to fill the blank was a waiver of such release by the defendant.

This charge (page 19, Rec.) was abstract and calculated to mislead the jury. There was no evidence tending to show that the rate of freight was left blank in the bill of lading because the defendant did not intend to claim the benefit of the exemption from liability therein expressed. Referring the charge to the evidence, and in view of the absence of all evidence tending to show why the blank was left, the charge was, virtually, an instruction to the jury, that the omission to insert the rate of freight, was a waiver by the defendant of the exemption from liability.

The court also charged the jury, at the request of the plaintiff, "that the paper read in evidence by the defendant, as a bill of lading, contains no restriction upon the liability of the defendant as a common carrier." The purport of this charge is, that the bill of lading, irreepective and independent of the parol evidence, and upon its face, contains no restriction upon the liability of the defendant as a common carrier. The language of the bill of lading is, "and in consideration of above rates it is agreed upon and distinctly understood, that the shipper release the Mobile and Montgomery Railway Company, and connections, from all liabilities for any loss or damage that may occur from the bursting of ropes and bagging, old damage, wet, or from fire while upon their roads." This language has no meaning whatever if it is not a restriction upon the liability of the defendant as a common carrier; and the charge of the court cannot be sustained if a common carrier has the right to limit his liability. It is settled by this court, that the common-law liability of a common carrier, for the safe carriage of goods, may be limited and qualified by special contract with the owner, provided such special contract does not attempt to cover loss by negligence or misconduct.

York Co. v. Central R. R'd, 3 Wall, 107.
2nd Waite's Actions & Defenses, p. 39-41.
Railroad Co. v. Androscoggins Mills, 22 Wall., 594.

In the case of York Co. v. Central R. R., *supra*, it ap-

peared from the evidence that the bill of lading was signed after the cotton was shipped on the steamer; that the agent of the shipper had not examined the bills, "that his attention was not called to the fire clause," and that his firm had no authority to ship for their principals with that exemption. Yet the court held, that the exemption was sufficient to protect the carrier, the fire not having been occasioned by any want of due care on his part.

This is upon the principle that a special contract is binding on the consignor, whether he reads the contract or not; and in the absence of fraud, concealment or improper practice, the legal presumption is, that stipulations in a bill of lading providing against liability were known and assented to by the consignor.

Belger v. Dinsmore, 51 N. Y., 166.

Kirkland v. Dinsmore, 62 N. Y., 171.

Sterns v. Liverpool *etc.* Steamboat Co., 57 N. Y. 1.

Grace v. Adams, 100 Mass. 505.

The error of the charge consists in the construction of the bill of lading given by the court,; the jury being thereby instructed, that, regardless of the parol evidence, the bill of lading itself contained no restriction upon the liability of the defendant, and that the defendant was bound to deliver the cotton, unless prevented by the act of God, or the public enemy.

Not controverting or doubting the settled rule, that the insurer of goods, consumed and totally destroyed by accidental fire in the course of transportation by a common carrier, is entitled, after he has paid the loss, to recover what he has paid, and for this purpose is authorized to use the name of the assured in a suit against the carrier; one of the questions raised by the present record is, can the insurer recover *what he has paid* under such circumstances upon a complaint, which is adapted solely to a suit by the *consignee* against the carrier to recover the loss sustained by him, as the owner of the goods, *for a failure to deliver.*

The Code of Alabama provides that any pleading which

conforms substantially to the schedule of forms therein prescribed, is sufficient—See Section 2979 of the Code of 1876, which is as follows: "If any pleading is unnecessarily prolix, irrelevant, or frivolous, it may be stricken out at the cost of the party so pleading, on motion of the adverse party; and any pleading which conforms substantially to the schedule of forms attached to this part, is sufficient." But the Code does not destroy the distinctions in the forms of action existing when it went into effect, and it has been held—"in all cases it is the duty of the pleader to present the facts of the case without confusion or obscurity in the forms prescribed by the Code, if this can be done; or any other forms equally brief and perspicuous, which in substance shall conform to those given in the Code. Brevity and clearness are both required." Whatever may be the cause of action, certainty should be used in stating the facts.

Munter vs. Rogers, 50 Ala. 583-288.

Hill vs. Nichols, 50 Ala. 338.

The complaint in the present case is in the form prescribed for suits against a common carrier—Code of 1876, p. 703. It has been held that this form of a complaint is sufficient only when the suit is brought by the consignee. If it is brought by another person, there must be an averment of ownership.—Montgomery & West Point Railroad vs. Edmunds, 41 Ala. 667-675.

Before and since the Code went into effect, an action could be brought in the name of the party having the legal title, for the use of another. When suit is thus brought, it was an admission of record that the interest in the suit is in the *user*. Section 2891 of the Code of 1876 provides: "In all cases where suits are brought in the name of the person having the legal right, for the use of another, the beneficiary must be considered as the sole party on the record." The plaintiffs, as stated in the margin of the complaint in the present case, are as follows: "L. C. Jurey and M. Gillis, partners under the name and style of Jurey & Gillis, who sue for the use of the Factors' & Traders' Insurance

Company of New Orleans, a corporation chartered and doing business in the State of Louisiana, plaintiffs." The character, in which a party sues, must be determined not from the description of himself, which he gives in the caption of the declaration, but from the body of the pleading. Tate vs. Shackelford, 24 Ala. 510. Upon like principle, the right of a plaintiff to a recovery must be determined from the averments in the body of the complaint, and not from the statement of the parties in the caption.

In no part of the body of the complaint is there any averment showing in what way and by what means, the Factors' & Traders' Insurance Company of New Orleans acquired an interest in this suit, or a right to bring this action in the name of the owners of the cotton, for their use or that they have any interest whatever in the suit. In such case, the recovery must be had alone upon the cause of action *stated in the complaint*, which is in the nominal plaintiff, and no other; and the defendant is not permitted to set up as a defense that the *usee* has no interest in the subject-matter of the suit, unless he connects it with a defense which is valid against the nominal plaintiff; as the interest of the *usee* is a question which does not otherwise concern him—his liability and the measure of the recovery being the same, whether the beneficiary has any interest in the suit or not. But this action having been thus brought, and the evidence showing that the Factors' & Traders' Insurance Company acquired their interest and their right to bring a suit against the carrier, by having paid their *insurance* liability to Jurey & Gillis, which was a secondary liability, the carrier being primarily liable, the form of complaint adopted in this case is not sufficient. The complaint should state with certainty, the facts showing their right to bring the action and the amount of recovery to which they are entitled. For when the action is brought in the name of the holder of the legal title, for the use of another, the *usee*, under the section of the Code above quoted, becomes the real plaintiff and is considered the sole party on the record;

and the cause of action on which he seeks to recover, and his right to recover, must not be other or different from that set forth in the complaint. In other words, the *allegata et probata* must correspond.

In Bullock vs. Ogburn, 13 Ala. 346, the suit was brought in the name of Ogburn, for the use of Sanders, upon a note payable to Ogburn. When the note was offered in evidence, it appeared that it had been regularly assigned to Sanders. It was held that the note was not admissible in evidence.

The complaint in the present case is in assumpsit, counting on a breach of the contract of the defendant to carry and deliver the cotton, and is an action *ex contractu*. The cause of action proved, is in *tort*; that the cotton, while in course of transportation, by the defendant, who had no contract with the Factors' & Traders' Insurance Company, was negligently burned, and the Insurance Company, by reason of having insured the cotton, was compelled to pay Jurey & Gillis the owners of the cotton, and thus sustained injury. In other words, the case proved is an action on the case for damages for negligently suffering the destruction of property of another, insured by the Factors' & Traders' Insurance Company, whereby such Company sustained an injury. This is *ex delicto* and case.—Wilkinson vs. Mosely, 18 Ala. 288. The right and measure of recovery in the two cases are distinct and different. In the suit on the contract for failure to deliver, the owner may recover all the direct and proximate damage caused thereby—as, for instance, the value of the cotton at the time and place when and where it ought to have been delivered, regardless of the fact that at the time of its destruction it may have been worth less. While in the case proved there can be no recovery beyond the amount the insurer was compelled to pay, with interest thereon, in no case exceeding the value of the property. In other words, the Insurance Company can only recover indemnity, the amount paid being the measure of recovery and the basis of the only recovery that can be had for its use. The general rule as stated in Hall

& Long vs. Railroad Companies, 13 Wallace, 373, is that "an underwriter, who has paid a loss, is entitled to recover *what he has paid* by a suit in the name of the assured against a carrier, who caused the loss."

The right of the insurer to bring suit in such case rests upon the doctrine of subrogation, worked out through the right of the owner of the goods, and is based upon the principle that as between a carrier of goods, and an insurer of them, the liability to the owner for their loss is primarily upon the carrier, and secondarily upon the insurer—that the insurer stands practically in the position of surety, and after he has paid the loss, is entitled to all the means of indemnity which the satisfied owner had against the party primarily liable.

Hall & Long vs. Railroad Companies, 13 Wall, 367.

If the insurer has paid only a part of the loss sustained by the owner, then the owner may sue the carrier on his contract of bailment, in his own right, both for the unpaid balance due him, and for what has been paid by the insurer in aid of the carrier. This necessarily results from the rule, forbidding the splitting of a cause of action. Where the title of the plaintiff is altogether legal, his right of action is the same as that of an obligee who sues for a debt, a part of which is equitably assigned. In such case he maintains the action and recovers for the benefit of himself and his equitable assignee.

Gibson, C. J. said: "In this case the insurer and the shipper could not sever, and the action was well brought, respectively for the use of each, in the name of him who had the legal title."—Gails vs. Hailman, 11 Penn. St. 515-520.

Where, however, the *total* loss has been paid to the owner by the insurer, the assured cannot maintain a suit against the carrier for his own benefit. He is not entitled to double satisfaction. In this case, the insurer has paid the total loss, and Jurey & Gillis have no interest in the suit, for Jurey testifies: "We have been paid by the Factors' & Traders' Insurance Company of this city by reason of its having

been covered by our open policy, and this suit is brought for the use and benefit of that Company as subrogees of our rights."—Rec. p. 15.

The insurer, however, may sue in the name of the assured, for his indemnity. Hence the owner of the goods cannot release the action brought in his name by the insurer, nor will a payment by the carrier to the owner, after notice that the insurer has paid the loss, be any defense to such action; while payment by the carrier to the owner, before the insurer had paid the loss, would be a sufficient defense to an action brought by the owner against the insurer.

Hart *et al.* vs. Western R. R. Corporation, 13 Metcalf, 99-105.

Conn. Fire Ins. Co. vs. Erie R. R. Co., 73 N. Y. 399.

Under the complaint, the Factors' & Traders' Insurance Company can only be considered a party to *receive* such recovery as Jurey & Gillis can obtain; that is, such recovery, as they could have obtained, if the name of the Insurance Company had not been stated in the caption of the complaint as the beneficiary; and cannot be considered a party to recover the loss, which the Company sustained, as insurer.—Stodder vs. Grant & Nichols, 28 Ala. 419.

While the insurer, in conformity to the rules of pleading, must bring suit in the name of the owner having the legal title and recover in his right, yet the right of the insurer to bring the suit depends upon the existence of facts which show a right of subrogation. When, therefore, a *total* loss has been paid by the insurer, the owner of the goods has no further beneficial interest in the suit. His name in the suit is used, simply because he holds the legal title; and to enable the insurer to recover in such case, the complaint should show both the liability of the common carrier to the owner, and the right of subrogation in the insurance company. When it is said that the insurer recovers in the right of the owner, it is meant that there must exist a liability of the carrier to the owner, to which he is subrogated, and through whom this right of sub-

rogation is worked out; but this does not relieve the insurer from the necessity of *averring the facts upon which he claims this right of subrogation*, and thereby showing a right to maintain the action in the name of the assured.

The right of subrogation, though originally a doctrine of equity, has become rocognized as a legal right, and, in certain cases to be enforced in legal actions.—Lafarge v. Herter, 11 Barb. 159; Aken v. Gale, 37 N. H. 501. When enforced by an action at law, the complaint, or declaration, should aver substantially the same facts which it would be necessary to state, when sought to be enforced in equity.

Also, a complaint, averring the facts, and stating the cause of action as proved would present issues as to the fact of the issurance of the cotton, and as to the fact and amount of payment—the right to indemnity, and its amount, and thus present issues additional to the issues presented by the complaint in its present form.

As further illustrating that the Factors' and Traders' Insurance Company could not recover under the present complaint, if the plaintiff, instead of demurring, had replied to the plea of payment that the Factors' & Traders' Insurance Company, the *usee*, had insured the cotton and had paid the loss, and that this was the only payment made to Jurey & Gillis, the replication would have been a departure from the issues presented by the complaint.—1 Chitty on Pleading, 644.

If we are correct in the foregoing principles, the court erred in refusing to give the charges asked by the defendant numbered two and four, which are as follows: "2. If the jury find from the evidence that Jurey & Gillis insured said cotton in and by the Factors' & Traders' Insurance Company of New Orleans, for whose use this suit is brought, then, upon the loss of the cotton by fire, and payment of the insurance money by said insurance company to Jurey & Gillis, said insurance company was subrogated to the rights of Jurey & Gillis, and can maintain a suit in the name of Jurey & Gillis for their use to recover

the amount paid by them to Jurey & Gillis; but upon these facts the plaintiffs cannot recover under the complaint in this case, and if the jury find such to be the facts, they must find for the defendant." "4. If the jury find from the evidence that Jurey & Gillis were paid by the Factors and Traders' Insurance Company (for whose use this suit is brought), before this suit was brought, for the damages sustained by Jurey & Gillis by the burning of the cotton, then the plaintiffs cannot recover in this action, and under the complaint in this case."—Burkham v. Spires, 56 Ala. 549.

The special plea of payment, filed by the defendant, was a good answer to the present complaint, and it mattered not whether the payment alleged was made by the defendant, or by a stranger, and accepted by Jurey & Gillis in full satisfaction. Therefore, the demurrer to the plea of payment should not have been sustained.

Barbour v. Washington, F. & M. Ins. Co., 60 Ala. 433.

Prater v. Stinson, 26 Ala. 456, 460.

If the payment was made by the Factors' & Traders' Insurance Company because of their liability as insurers of the cotton, or if it was made after the Factors' & Traders' Insurance Company became the owner of the cause of action, with notice to the defendant of their interest, this is matter of replication. In Remy v. Duffee, 4th Ala. 365, it was said: "The admissions of the plaintiff and his deceased partner, whilst owners of the notes here sued on, that they were discharged by payment by the defendant, is conclusive without explanation or contradiction against their right to recover in this action. These admissions lose none of their force because the suit is brought for the use of another, as it does *not appear* that he had any interest in the notes when the admissions were made."

The admission of record that the Factors' & Traders' Insurance Company had the interest in the suit, does not show that they had any interest prior to the commencement of the suit, and is notice to the defendant that the Company

had the interest in the suit, only at the time of its commencement. The demurrer to the plea of payment having been sustained, the defendant could not offer any evidence that payment had been made to Jurey & Gillis, or the Factors' & Traders' Insurance Company, under the plea of the general issue or any other plea.—See leading case of Petty v. Dill, 53 Ala. 641–645.

Even if the plaintiffs were entitled to recover under the complaint, the court erred in charging the jury, of its own motion, "that the position taken in argument by the counsel for defendant was not the law, namely: that if they believed the plaintiff, Jurey & Gillis, before the beginning of this suit, had been paid by the Factors' and Traders' Insurance Company, as insurer, paying the loss they had insured against, and that the said Jurey & Gillis had no interest in the recovery, then the said insurance company was the real plaintiff in the case, and the burden of proof was on it to show the jury by satisfactory evidence how much it had so paid, and that if it failed to do so or to give the jury evidence to enable them to determine satisfactorily what its loss or damage was, then nothing more than nominal damages could be recovered in this case."

The court also erred in refusing to give the charges asked by the defendant, numbered three and five, (Record, page 21).

Independent of any question of pleading, or of the form of action adopted in this case, it is very clear from the undisputed evidence in the case, that the only claim which the Factors' and Traders' Insurance Company could assert, is to recover the amount paid by them, with interest thereon. It is no where pretended that they had any other right, or that there was any transfer by contract, or in any manner, other than they had insured the cotton and paid the loss. Standing thus practically in the position of a surety, the full measure of their right is indemnity for the loss which they have sustained, and the loss which they sustained was the amount which they paid to Jurey & Gillis on

account of their insurance. Such payment was a condition precedent to the assertion of any right against the carrier, and it was incumbent on them, therefore, not only to show the payment, but the amount and time thereof. Without such payment there could be no right of subrogation, and the subrogation extends only to indemnity for the loss which they sustained.

It is a universal rule that where a surety seeks to be subrogated to the rights of another for his indemnity, he must show the amount of his damage. This is a vital requirement, and the burden is on him to show its existence.—Columbus Insurance Company vs. Peoria Bridge Company, 6 McLean, 70—but the court charged the jury: "that if the plaintiffs were entitled to recover, the measure of damages would be the value of the cotton at New Orleans, where it was to have been delivered together with interest on said sum so ascertained at eight per cent. per annum from the time when the cotton ought to have been delivered." The value of the cotton at the place and time of delivery, is the measure of damages if the suit had been brought by Jurey and Gillis for their own benefit, and to recover the damages sustained by them; but it appearing that the suit is to recover the damages sustained by the Insurance Company, then the measure of damages is the amount which the Insurance Company had been compelled to pay by its contract of insurance, and interest thereon, from the time of payment,—provided such amount did not exceed the value of the cotton.—Martin vs. Ellerbe, 70 Ala. 326, 338; Bonney vs. Seely, 2 Wess. 479; Blow vs. Maynard, 2 Leigh, 30.

The court erred in charging the jury, that it was not law that the burden of proof was on the Insurance Company, to show the jury by satisfactory evidence how much it had paid, and that if it failed to do so or to give the jury evidence to enable them to determine satisfactorily what its loss or damage was, then nothing more than nominal damages could be recovered in this case. And the court also erred in charging the jury that the measure of damages was the *value of the cotton* at New Orleans.

We submit that the surety seeking indemnity is bound to show the exact amount paid by him, or give a satisfactory explanation why he cannot do so.

The place for the performance of the contract of bailment was New Orleans, Louisiana, where the cotton was to be delivered, and the rate of interest which the plaintiffs were entitled to recover, if entitled at all, was the rate of interest at the place of performance.

The rate of interest in Louisiana is five per cent without a contract, and the court erred in charging the jury, that the plaintiffs were entitled to recover eight per cent. interest.

Boyce vs. Edwards, 4 Peters, 111-123.

Hunt's Ex'rs. vs. Hill, 37 Ala. 702.

Fanning vs. Consequa, 17 Johnson, 510-16.

THOMAS G. JONES,
DAVID CLOPTON,
Attorneys for Plaintiff in Error.

111-584

Supreme Court of the United States.

OCTOBER TERM, 1883.

[No. 320.]

THE MOBILE & MONTGOMERY RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

L. C. JUREY AND M. GILLIS, PARTNERS AS JUREY & GILLIS, FOR THE USE OF THE FACTORS AND TRADERS INSURANCE COMPANY OF NEW ORLEANS.

In Error to the Circuit Court of the United States for the Middle District of Alabama.

BRIEF OF

D. S. TROY AND H. C. TOMPKINS,

ATTORNEYS FOR DEFENDANTS IN ERROR.

BARRETT & CO. PRINTERS, MONTGOMERY, ALA.

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This was an action under the Code of Alabama, brought by the shippers, who were also the consignees, suing for the use of the underwriters, against a common carrier for failing to deliver freight, the suit being in the form prescribed by the Code. (See Code of 1876, p. 703.)

The first question which arises is upon the demurrer to the plea of payment interposed by the plaintiffs in error. This plea (Record, p. 5,) is as follows: "For further answer to the complaint the defendant says, that the plaintiffs, the said Jurey & Gillis, were paid the damages for the recovery of which this suit is brought before the action was commenced." The suit was brought for the use of the Factors and Traders Insurance Co. The Code of Alabama (Code of

1876, § 2891,) declares, that "in all cases where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party on the record."

Under this statute a simple plea of payment is necessarily bad, which does not aver a payment to the beneficial plaintiff; and in suits brought for the use of another, if the defendant relies upon a payment to the person having the legal right before the usee acquired his interest, it must be so averred. In other words, without this averment the plea would be equivalent to a plea of payment to some one other than the plaintiff in the suit.

The plea in this case not only omits this averment, but omits to state that the payment was made by the defendant, so that the plea may be true, and a person not a party to the suit may have made the alleged payment to another person also not a party to the suit. The Circuit Court, therefore, properly sustained the demurrer to the plea of payment.

The case was tried on the plea of not guilty.—Record, pp. 5, 6. This plea under the Code of Alabama (Code of 1876, § 2988,) put in issue only the allegations of the complaint, which are as follows: "The plaintiffs claim of the defendant the sum of twelve thousand dollars, as damages for the failure to deliver certain goods, viz: one hundred and ninety-seven bales of cotton, weighing ninety-six thousand nine hundred and thirty-six pounds, received by the defendant, as common carrier, to be delivered to the plaintiffs at New Orleans, La., for a reward, which it failed to do." The issues presented by this state of the pleading were,

1st. Whether the defendant (plaintiff in error) received the goods to be transported;

2d. Whether it failed to deliver them, and

3d. The value of the goods.

The Code of Alabama (Code of 1876, § 2988,) requires that all defenses, other than a denial of the cause of action

stated in the complaint, shall be pleaded specially. Section 2987 declares: "That the plea must consist of a succinct statement of the facts relied on in bar or abatement of the suit," . . . . and section 2988, . . . "in all suits where the defendant relies on a denial of the cause of action as set forth by the plaintiff, the defendant may plead the general issue, and in all other cases the defendant must briefly plead specially the matter of defense, and may, by leave of the court, plead more pleas than one." Under these statutes, if the defendant intended to rely on the defense that the cotton was destroyed by fire without fault on its part, or on the defense that the Factors and Traders Insurance Co., the real plaintiffs, were only entitled to recover what they had paid, each of these defenses should have been specially pleaded. Neither of these defenses were within the issue upon which the case was tried.

Petty v. Dill, 53 Ala. 645.

Slaughter v. Doe, ex dem. Swift et al., 61 Ala. 498-9.

Trammell v. Hudmon, 56 Ala. 235.

The two defenses above mentioned, not being within the issue on which the case was tried, the only possible objection to the evidence, to the admission of which plaintiff in error objected, was that the evidence was immaterial; and the charges asked by the plaintiff in error and refused, were wholly abstract, as to any matter really within the issue joined.

There was no controversy in the case as to any one of the allegations of the complaint. Each allegation was fully proved, and there was no evidence offered to contradict any of them. The evidence to which objection was made, was relevant to prove the allegation that the cotton was delivered to the plaintiff in error.

There is no conflict in the evidence, and on the pleadings and evidence presented in the record the Circuit Court could have properly charged the jury that the defendants in error

were entitled to recover the value of the cotton at the time and place of delivery.

The point made by the counsel for plaintiff in error, that the recovery should be limited to the amount paid by the Factors and Traders Insurance Company, was not within the pleadings on which the case was tried but if it was, we insist the point is not well taken. The only evidence in regard to the *amount* of the loss was the deposition of Jurey, one of the nominal plaintiffs, who proved the value of the cotton at the time it ought to have been delivered, and he says "we have been paid by the Factors and Traders Insurance Company of this city by reason of it having been covered under our open policy." Record, p. 15. He does not state in dollars and cents the amount paid but when he states the value of the cotton and adds "we have been paid" the only possible inference is that they were paid in full. The court and the jury, in absence of any other evidence, were bound to assume that the payment was of the whole loss. The charges limiting the recovery to the amount paid and denying the right to the recovery of anything but nominal damages, because there was no proof of the amount paid, were the merest abstractions.

But if there had been no proof of the amount paid by the Factors and Traders Insurance Company, or if the proof had shown that it had paid less than the value of the goods, and thereby acquired from Jurey & Gillis the right to sue on the contract in their name, this would not affect the measure of the liability of the common carrier. There is neither reason nor authority for holding that a common carrier who violates a contract can discharge the liability incurred, by paying less than the actual damages sustained.

The measure of the liability of the common carrier is fixed by the breach of his contract and it is immaterial whether he discharges this liability by payment to the party with whom he contracts, or to an assignee. This principle is carried so far, in Gails vs. Hailman, 11 Pa. St. 515, cited in brief of

plaintiff in error, as to authorize a recovery in the name of the shipper for the joint use use of himself and an insurer who had paid part of the value.

It is true, as stated in Hall & Long vs. Railroad Companys, 13 Wall. 373, cited in brief of plaintiff in error, that "an underwriter who has paid a loss is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss," but this does not limit the liability of the carrier for the loss to the amount paid by the underwriter. If the loss is in excess of the amount paid by the underwriter, the carrier is liable for such excess, to the shipper, or to any one who sues in the right of the shipper. On proper averments the underwriter can maintain an action against the carrier and recover what he has paid, without regard to the rights of the shipper and without his consent, but there is neither reason nor authority for holding that this right of action by the underwriter limits the liability of the carrier for the loss to the amount paid by the underwriter, or takes away from the shipper or any one suing in his right, the right to recover the full amount of damage sustained by the carriers breach of contract.

This suit is not based on the underwriters right of action for reimbursement, but is based on the shipper's right of action, and it is immaterial to the carrier how the underwriter acquired that right of action. If the underwriter paid less than the amount for which the carrier was liable, the carrier was still liable for the residue to the shipper, and in action as in this case asserting alone the right of the shipper, whether brought for the use of the shipper, or for the use of the underwriter, or for the use of a stranger, the measure of the recovery against the carrier would be the same. It may be true that the evidence in this case discloses that the Factors and Traders Insurance Company might have maintained an action of tort in its own name, or in the name of Jurey & Gillis for its use, to recover what it had paid,

but this right of action, if it existed, did not impair the right of action against the carrier on the contract which it had made nor affect the measure of recovery thereon. Where goods are lost by the negligence of the carrier the shipper has his election, to bring his action *ex delicto* for the negligence or *ex contractu* for the failure to deliver. The liability of the carrier and the measure of recovery being the same in either case, either of these actions may well be brought for the use of the shipper himself or of the underwriter or of any other person, who by assignment or otherwise becomes entitled to the recovery. If the suit be brought in the name of the shipper for the use of a person not entitled to the recovery, the right of the real plaintiff to recover can only be put in issue by a proper pleading denying the right of such real plaintiff to the recovery, or averring payment to the nominal plaintiff before the assignment of the cause of action.

In the next place, if the court should regard the pleadings as sufficient to present the other defense, viz., the alleged exception in the bill of lading from liability for loss or damage by fire, the defense itself wholly fails. It was proved on both sides and not controverted, that the cotton was shipped on open flat cars, and none of it was covered.—Deposition T. R. Scott, Recod p. 11, and testimony of the engineer, Morgan, and the brakeman.—Record p. 16, and brief of plaintiff in error. pp. 4–6.

The Supreme Court of Alabama, in M. & O. R. R. v. Hopkins, 41 Ala. 486, lays down the general rule (p. 500), "that public policy forbids that he (a common carrier) should be allowed to contract for exemption from liability for damage occasioned by the negligence, willful default, or tort of himself or his servants." And in M. & W. P. R. R. v. Edmonds, *Ib.* 667, the court holds, that where there was a contract for transporting cotton with a stipulation expressly exempting the carrier from loss or damage by fire, and the cotton was transported on open cars, this was evi-

dence of negligence which should be left to the jury; and that notwithstanding notice to the shipper that the cotton would be transported on an open car, this did not relieve the carrier from the results of his neglect in thus transporting it.

M. & O. R. R. v. Jarboe, 41 Ala. 644.
Steele & Burgess v. Townsend, 37 Ala. 247.
Grey v. Mobile Trade Co. 55 Ala. 387.

These cases lay down the rule, that the carrier is, *prima facie*, guilty of negligence when a loss occurs, and that where there is a special contract limiting his liability for the loss of goods, "that to bring himself within the exception, he must make, at least, a *prima facie* showing that injury was not caused by his negligence."

Grey v. Mobile Trade Co., *supra*.

The plaintiff in error not only failed to make a *prima facie* showing that the injury was not caused by its negligence, but there was no evidence of a contract exempting the plaintiff in error from liability for loss or damage by fire. The bill of lading read in evidence (Record, p. 17) was properly construed by the Circuit Court in the first and second charges given at the request of the defendants in error (Record p. 19), viz., "that it contained no restriction on the liability of the plaintiff in error as a common carrier." Such restriction can only be secured by contract based upon a sufficient consideration, and the fact that the rate of freight, the only consideration for the restriction, was left blank in the bill of lading, demonstrates that the contract for the restriction was not within the contemplation of the parties who made and accepted the bill of lading. If the parties had intended to stipulate for the restriction, the rate of freight would have been inserted in the blank space left in the printed form for that purpose. We are obliged to presume in construing the paper, that there was some purpose

to be served by the omission of the rate of freight from the blank space left for it in the body of the contract, and its insertion at the bottom below the printed form. The only possible purpose for this change in the form of the bill of lading, was to relieve it of the restrictions on the liability of the carrier which would have appeared if the blank had been filled.

The liability of the carrier can only be restricted by a contract based on a sufficient consideration, and clear and explicit in its terms.

M. & O. R. R. Co. v. Hopkins, 41 Ala. 486.

M. & W. P. R. R. Co. v. Edmonds, *Ib.* 667.

M. & O. R. R. Co. v. Jarboe, *Ib.* 644.

Steele & Burgess v. Townsend, 37 Ala. 247.

Grey v. Mobile Trade Co., 55 Ala. 387.

Nicholas v. N. Y. C. & H. R. R. Co., 9 Am. & Eng. R. R. Cases 103 (N. Y. Court of Appeals, 1882).

Holsapple v. the R. W. & O. R. R. Co., 3 Am. & Eng. R. R. Cases, 487 (N. Y. Court of Appeals, 1881).

If, however, the court erred in declaring the legal effect of this instrument in writing on its face, it was error, without injury to the plaintiff in error, because the uncontradicted evidence of its agent, Scott, who received the cotton (Record, p. 11), and of Jurey, the shipper (Record, p. 15), show that this paper writing did not evidence the contract between the parties. Scott says, "Mr. Jurey asked me if the road would be responsible in the event the cotton was burned on the platform, or on those cars," (referring to the open platform cars,) "and I replied that it would be in either event;" and Jurey testifies: "I paid an outside rate of freight in consideration of having the cotton transported without any exceptions or conditions." This evidence, and the other evidence objected to by the plaintiff in error, was offered, not to vary the effect of the bill of lading, but to

show what the contract was, and that the bill of lading was not the contract.

The bill of lading is but evidence of the contract, and it may be shown that the goods were carried under a different contract made by the shipper and the carrier.

Trask v. Jones, 5 Bosw. 62.

Crenshaw Hall, the broker, to whom the bill of lading was delivered, testifies (Record, p. 17) on behalf of the plaintiff in error, "That he did not make any agreement or have any understanding with the defendant" (plaintiff in error) "as to the price of shipping the cotton, but simply sent the same to the depot, by order of Mr. Jurey, to be shipped to New Orleans. * * * * * * Jurey told witness, he, Jurey, would go and make the contract, that he thought he could get better rates." This witness further testified (Record, p. 17), "that Mr. Jurey was in the city at the time the cotton in controversy was being hauled to the depot; that at the time he, witness, received the bill of lading, his recollection was that said Jurey was some ten miles from Montgomery in the country, and that he did not return to the city of Montgomery until after the news had come of the burning of the cotton." Jurey testified (Record, p. 15), "After the cotton had been destroyed by fire, I saw the bill of lading for the first time, and noticed that risk by fire was excepted. I immediately went to Mr. Scott and called his attention to it, and that such was not our agreement."

If the plaintiff in error, knowing the agreement between Scott and Jurey, as it did, Scott being its authorized agent, intended by the bill of lading delivered to the broker Hall, who was ignorant of the agreement, to secure a restriction or exemption from a liability which it had expressly assumed, in the agreement made, it was simply an attempt to perpetrate a gross fraud on the shippers. The testimony of Jurey and Hall, above quoted, shows that Hall had no authority to make the contract, and that Jurey never accepted

the bill of lading as evidence of the contract. M. H. Sayre, who signed the bill of lading was a clerk under Scott's authority (Deposition of Scott, Record p. 11), and presuming as we must, that he acted with common honesty, the presumption is conclusive, that he left the rate of freight blank in the body of the bill of lading and stated it at the bottom for the purpose of avoiding the restrictions which would have appeared if the rate had been inserted in the blank. Hence the defense is based on a restriction of the carrier's liability which was not only not contracted for by the terms of the bill of lading, but which it would have been a gross fraud on the shippers to have inserted there, and for which there was no pretence of any consideration.

If the restriction had been inserted with the knowledge and consent of the shippers, after the rate of freight had been agreed on, the total want of consideration rendered it absolutely nugatory. If the carrier agreed to transport the cotton for $2.00 per bale freight, without restriction as to its liability, the subsequent insertion of the restriction in the bill of lading was void for want of consideration.

See authorities *supra*.

Admitting that the place for the performance of the contract was New Orleans, Louisiana, still the rate of interest which the defendants in error were entitled is the Alabama rate, eight per cent.; no evidence was offered as to the rate of interest in Louisiana, and in the absence of anything to the contrary, the law presumes that the domestic law is the same as the law of Louisiana.

The courts of the State will not take judicial notice of the rate of interest in Louisiana.

Drake v. Glover, 30 Ala. 382.

Mobile R. R. v. Whitney, 39 Ala. 468.

Cubbedge v. Napier, 62 Ala. 518.

And the Federal courts are bound by the decisions of the State courts.

Swift v. Tyson, 16 Peters 1.

The Code of Alabama (1876), section 3042, prescribes the rule and the statutes of the State provide the means of proof.

See rates of interest appended to the Acts of 1882–83, in conformity with the requirements of the Code.

In the absence of any evidence as to the rate of interest in Louisiana, and of any exception to the charge, which could possibly have suggested to the Circuit Court, that the plaintiff in error claimed or insisted on Louisiana interest and not Alabama interest, the plaintiff in error waived its right to claim Louisiana interest, if such right existed. The charge (see 11 Assignment of Error) is general, involving several propositions; and the exception (Record, p. 19,) is also general, and does not indicate the proposition to which the exception was directed. The charge asserted that the measure of damages was the value of the cotton at New Orleans where it was to be delivered; interest on this sum, and the rate of interest; the general exception to the charge applied to each one of these three distinct propositions. The two first of the propositions are unquestionably correct, and even if the third proposition, namely as to the rate of interest, was erroneous, the exception is not well taken.

Irvin v. State, 50 Ala. 181.
Cohen v. State, 50 Ala. 108.
Jacobson v. State, 55 Ala. 151.
Caldwell v. Parmer, 56 Ala. 405.
S. & N. R. R. Co. v. Jones, 56 Ala. 507.
Bernstein v. Humes, 60 Ala. 582.
Gray v. State, 63 Ala. 66.
S. & N. R. R. Co. v. McLendon, 63 Ala. 266.
Holland v. Barnes, 53 Ala. 83.